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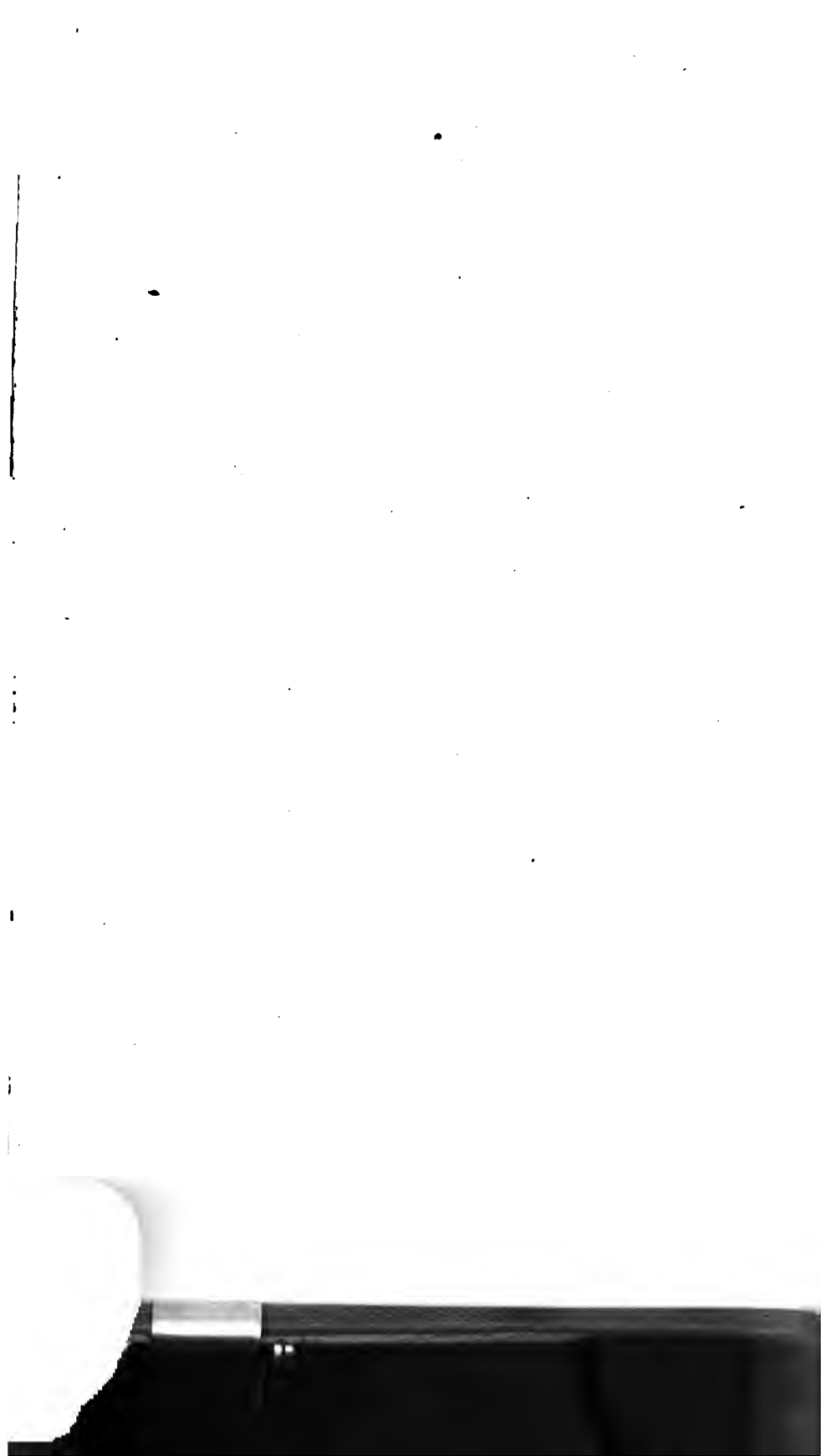
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

Vol. LV.

CONTAINING ALL CASES OF GENERAL AUTHORITY IN THE FOLLOWING
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STERLING R. COCKRILL, CHIEF JUSTICE.
JOHN R. EAKIN,*
WILLIAM W. SMITH,
BURRILL B. BATTLE.†

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DWIGHT LOOMIS,
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ALFRED M. CRAIG,
DAMON G. TUNNICLIFF,
SIMEON P. SHOPE.¶

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WILLIAM E. NIBLACK, CHIEF JUSTICE.
GEORGE V. HOWK,
BYRON K. ELLIOTT,
ALLEN ZOLLARS,
JOSEPH A. S. MITCHELL.

* Died Sept. 3, 1885.
§ Died July, 1886.

† Elected Nov. 10, 1885.

‡ At June term, 1885.

¶ Elected June, 1885, vice Tunnickliff.

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IOWA.

AUSTIN ADAMS, CHIEF JUSTICE.
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JOSEPH R. REED,
JAMES H. ROTHROCK,
JOSEPH M. BECK.

KANSAS.

ALBERT H. HORTON, CHIEF JUSTICE.
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WILLIAM A. JOHNSTONE.

LOUISIANA.

EDWARD BERMUDEZ, CHIEF JUSTICE.
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ROBERT B. TODD,
THOMAS C. MANNING,
CHARLES E. FENNER.

MASSACHUSETTS.

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CHARLES DEVENS,
WILLIAM ALLEN,
CHARLES ALLEN,
OLIVER WENDELL HOLMES, JR.,
WILLIAM S. GARDNER.

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ALLEN B. MORSE, CHIEF JUSTICE.†
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THOMAS R. SHERWOOD,
JOHN W. CHAMPLIN.

MISSOURI.

JOHN W. HENRY, CHIEF JUSTICE.
ELIJAH H. NORTON,
ROBERT D. RAY,
THOMAS A. SHERWOOD,
FRANCIS M. BLACK.

* Resigned Oct. 1, 1888.

† At October term, 1888.

‡ From Dec. 31, 1888.

LIST OF JUDGES.

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H. CLAY EWING,
DAVID A. DEARMOND.**

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THOMAS C. GREEN,
ADAM C. SNYDER,
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WILLIAM H. SEEVERS,
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ALBERT H. HORTON, CHIEF JUSTICE.
DANIEL M. VALENTINE,
WILLIAM A. JOHNSTONE.

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THOMAS A. SHERWOOD,
FRANCIS M. BLACK.

* Resigned Oct. 1, 1885.

† At October term, 1885.

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Age	34.5	10.5	18-65
Gender			
Male	50.0		
Female	50.0		
Marital status			
Married	60.0		
Single	40.0		
Divorced	0.0		
Widowed	0.0		
Education			
High school or less	10.0		
Some college	30.0		
College graduate	40.0		
Postgraduate	20.0		
Occupation			
Professional	30.0		
Managerial	20.0		
Technical	10.0		
Service	20.0		
Unemployed	10.0		
Retired	10.0		
Income			
\$0-\$10,000	10.0		
\$10,000-\$20,000	20.0		
\$20,000-\$30,000	20.0		
\$30,000-\$40,000	20.0		
\$40,000-\$50,000	10.0		
\$50,000-\$60,000	10.0		
\$60,000-\$70,000	10.0		
\$70,000-\$80,000	10.0		
\$80,000-\$90,000	10.0		
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Note: Percentages are based on the total sample of 100 participants.

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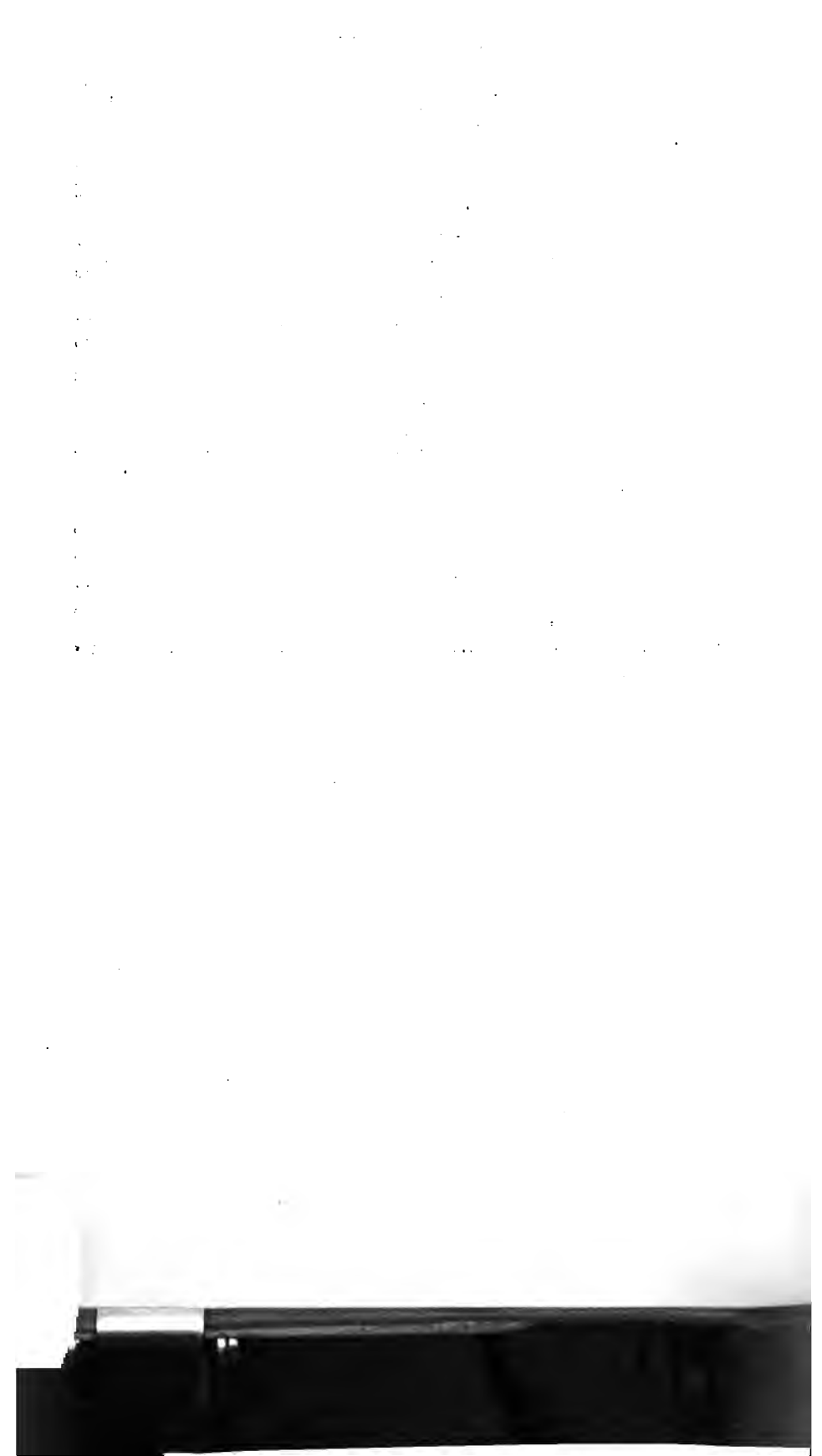
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CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

**GRIFFITH V. CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD
COMPANY.**

(28 S. C. 25.)

Property — in dead human body — in wearing apparel.

An administrator cannot maintain an action for the negligent or willful mutilation of the dead body of the intestate, but he may sue for injury to the wearing apparel. (*See note, p. 6.*)

ACTION for mutilation of the dead body of the plaintiff's intestate, and for destruction of its apparel and a watch by negligence. The man had been murdered and placed on defendant's track, and repeatedly run over by its cars. The defendant had judgment below.

S. F. Youmans and H. A. Meets, for appellants.

J. H. Rion, contra.

SIMPSON, C. J. This action was brought by the plaintiff, appellant, as administrator of W. Scott Hook, deceased, to recover damages for the mutilation of the dead body of the intestate, and the destruction of the apparel in which it was clad, and of a silver watch at the time on the person of the deceased, all of which is al-

leged to have occurred by the gross negligence of the defendant company in running a train of cars over said dead body three several times. The defense denied negligence, and claimed that the complaint did not state facts sufficient to constitute a cause of action.

[Omitting a question of practice.]

Apart from the question of procedure, the appellant contends, next, that there is such a property or interest in the dead body of a human being as to sustain an action for its willful or negligent mutilation, and that the right of action in such cases belongs to the administrator of the deceased. This proposition raises three questions as applicable to the case at bar: 1. What is meant by the term property? 2. Can this property attach to the dead body of a human being? And 3. If so, does it belong to the administrator?

The term property may be defined to be the interest which can be acquired in external objects or things. The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which, according to law, may be acquired in them, or over them. This interest may be absolute, or it may be limited and qualified. It is absolute when a thing is objectively and lawfully appropriated by one to his own use in exclusion of all others. It is limited or qualified when the control acquired falls short of the absolute, which may be the case sometimes for several reasons not necessary to be adverted to here. Now to entitle one to bring action for an injury to any specific object or thing, he must have a property therein of the one kind or the other mentioned. If he has no such property, he can have no cause of action however flagrant or reprehensible the act complained of may be.

Can property, either absolute or qualified, be acquired in a corpse, and especially as involved in the case under investigation, can such property be acquired by the administrator of the deceased? As to absolute property, Mr. Blackstone says: "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes." 2 Bl. Com. 429. In Jac. Fish. Dig. it is said: "A dead body bylaw belongs to no one, and is therefore under the protection of the public." Mr. Bishop says: "There can be no property in a person deceased, conse-

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quently larceny cannot be committed of his body, but it can be of the clothes found upon the body, or of the shroud." Bish. Crim. L., § 792. Citing East P. C. 652; Hawkins' and Hale's Pleas of the Crown, Mr. Wharton says: "*Corpus humanum non recipit estimationem.*" Whart L. Max. 228. Lord Coke said: "The burial of the cadaver, *nullius in bonis, caro data vermibus*;" flesh given to the worms. Mr. Blackstone said again: "This is the case of stealing a shroud out of the grave, which is the property of those, whoever they may be, that buried the deceased, but stealing the corpse itself, which has no owner (though a great indecency), is no felony, unless some graves clothes be stolen with it." 4 BL. Com. 235.

These are strong expressions from leading and distinguished authors, all tersely conveying the same doctrine and concurring to the full. We have been referred to no case by appellant in conflict with this doctrine, nor have we been able ourselves to find a case, or a single expression in any text-book, which affects it in the slightest degree. And that this should be so is not surprising. Because, while it is natural that we should all feel that the remains of ancestors and loved ones should be tenderly watched, and their decent interment carefully guarded, and the mutilation of their dead bodies and the disturbance of their sepulchres severely punished, and while all laws necessary to that end should be passed and strictly and sternly enforced, yet even for this purpose, to make such venerated remains the absolute property of any one, in the sense of objective appropriation, would be abhorrent to every impulse and feeling of our natures.

It is true, it is said that in some portions of Europe during the middle ages the law allowed a creditor to seize the dead body of his debtor, and in ancient Egypt the corpse of the father might be hypothecated by the son in order to borrow money. But these were in semi-barbarous and heathenish times, and such ideas have no existence now in any portion of the globe. On the contrary, wherever civilization at least has dawned, or has commenced to throw even a flickering light upon the people, reverence for the dead has become a universal and a most sacred sentiment, one which would revolt at the idea of their remains becoming property, much less property in the sense of being appraised and placed upon the inventory of the administrator, subject to the payment of debts, and to distribution among the next of kin, which would be required

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by the law of this State if such remains could be regarded as property, and on that account passing to the administrator.

But can there not be a qualified property in the dead? one which gives control to some one with the view to protection, to decent interment, and to undisturbed repose, while they are dissolving and returning to the dust from which they were created? Can it be that there is no legal guardianship of the dead? And that when the life escapes the body is left, so far as the law is concerned, without protection, even from wanton and malicious depredation, and that those to whom it was bound in life by the tenderest of ties can invoke the aid of no court in preventing its mutilation? And must they resort to violence and force for this purpose? If such be the fact, it is a reproach to our judicial system, and one which calls earnestly for legislative interposition. And yet such seems to be the fact, at least the matter is left in great doubt, so far as our limited examination of the cases, both in this country and in England, amid the press of our duties, has enabled us to ascertain.

Certainly the administrator has no legal control or authority over the dead body of the person upon whose estate he has administered. His entire authority is derived from the act, by virtue of which his letters have been granted to him, and that gives him charge only of the "goods and chattels, rights and credits," which were of the deceased. The body of the intestate belongs to neither of these classes, and there is therefore no law for him to take it in charge. True, he is required to pay, as the first of debts, the funeral expenses, but it would be a violent assumption to conclude on that account that he becomes the legal custodian of the remains, or even if he should, it could only be so as to the funeral and burial, because the expenses extend no further—they stop at the grave. The question would then arise, who could legally protect beyond that point, and in whose behalf could the law be invoked to redress an invasion of the tomb?

We have looked diligently through the common-law reports of England, and have found no case in which the civil courts have been appealed to in matters connected with the bodies of the dead. On the contrary, their burial, the grave-yards and cemeteries in which they are interred, and the religious ceremonies observed, have been left exclusively to ecclesiastical cognizance, the civil courts universally holding, in the language of Lord Coke, that the

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burial of the cadaver is *nullius in bonis*. In some of the States upon this continent, especially in Rhode Island, Indiana, Pennsylvania, and New York, the courts, endeavoring to escape from this reproach, have held in general terms that the corpse belongs, not to the administrator, but to the next of kin, and that is as far as the cases referred by appellant's counsel seem to go.

In the case of *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227; s. c., 14 Am. Rep. 667, it was held that while a dead body is not property in the strict sense of the common law, it is *quasi* property, over which the relatives of the deceased have rights which the courts will protect. In the case of *In re Widening Beekman Street*, 4 Bradf. 503, it was held that the right to bury the corpse and to preserve its remains is a legal right which the courts will protect; that such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin. In *Bogert v. City of Indianapolis*, 13 Ind. 135, it was held that the bodies of the dead belong to the surviving relatives in the order of inheritance, as property. In *Wynkoop v. Wynkoop*, 42 Penn. St. 293, it was held: "That a wife has no right or control over the body of her husband, deceased, after burial. The disposition of the remains of the deceased belongs thereafter exclusively to his next of kin; that though it was her duty to bury the body, as a widow, after interment her right ended."

Upon what authority or established principle of the common law these decisions were founded, even to the extent of legalizing the right of the nearest of kin, does not fully appear, but they afford no support to the position that the administrator has any control whatever, which is the question here. We have no case in our own reports upon the subject, certainly no case bearing upon the precise point before us, *i. e.*, the rights of the administrator. In the absence of all authority, and looking at the act which authorizes administration, and defines the duties and powers of administrators, and describes the property which by operation of law becomes his, we are constrained to the conclusion that so far as this action is founded upon the mutilation of the deceased by the defendant company, whether accidental, willful, or negligent, it cannot be sustained by the plaintiff, and that his honor, the Circuit judge, was correct in so holding.

This however does not apply to the clothes in which the body was clad, and the silver watch upon the person. As to these, the administrator was the legal owner, and his appointment, though

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made after the occurrence, reached to the death, his title commencing at that time. As to these, then, the action was maintainable, and we think that his honor was in error in not so holding. *McClane's Adm'r v. Elder*, 2 Mill Con. 184; *Dealy v. Lance*, 2 Speer, 487.

But the majority of this court having, in the case of *Mestas v. C. C. & A. R. Co.*, 23 S. C. 1, determined that the Circuit judge had the power to review and reverse the findings of fact of the referee, and he having exercised that power in this case, the judgment of this court therefore is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—See 18 Albany Law Journal, 485.

In re Wong Yung Quy, 6 Sawy. 449, holds that there is no property in a human corpse, and it cannot be an export.

The same case was held in *Guthrie v. Weaver*, 1 Mo. App. 136: "And there is none in the shroud which surrounds it, when that corpse has once been committed to the tomb." See *Wynkoop v. Wynkoop*, 43 Penn. St. 293.

"Our law recognizes no property in a corpse." *Sharpe's case*, Dears. & B. 180.

FELDMAN V. CITY COUNCIL OF CHARLESTON.

(23 S. C. 57.)

Constitutional law — lent municipal bonds.

A large part of the city of Charleston having been burned, the legislature authorized the city to issue and lend its bonds to citizens desiring to rebuild. The bonds were issued and lent accordingly. *Held*, that they were invalid.

ACTION on bonds. The opinion states the case. The plaintiff had judgment below.

G. D. Bryan and *B. H. Rutledge*, for appellants.

A. G. Magrath, *S. Lord*, and *Simons & Seigling*, contra.

McIVER, J. These two cases, involving the same principles, were argued and will be considered together. They grow out of the following state of facts: All the buildings on a very large portion of the city of Charleston having been destroyed by fire, the city council passed an ordinance on August 28, 1866, providing for

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the issue of bonds of the said city to an amount not exceeding \$2,000,000, to be loaned to individuals for the purpose of enabling them to "build up and rebuild the waste places and burnt districts of the city of Charleston, or erect improvements upon their lots," under such terms and regulations as were prescribed in the ordinance. Doubts being entertained as to the power of the city council to accomplish the proposed object "without the permission and license of the general assembly," an act was passed by that body September 19, 1866, which, after setting out in full the ordinance which had been passed by the city council, declared: "That all and singular the provisions of the aforesaid ordinance of the city council of Charleston be, and the same are hereby authorized and confirmed; and authority is hereby given to the said city council of Charleston to proceed in the premises and to carry into effect the foregoing provisions."

In pursuance of the provisions of this ordinance, the city council of Charleston, from time to time, issued its bonds, commonly called "Fire Loan Bonds," and loaned the same to various individuals, under the terms and regulations prescribed. The plaintiffs in the cases above stated being the owners and holders of some of these bonds, all of which were issued after the adoption of the Constitution of 1868, brought these actions on certain past due coupons of said bonds, and the defense set up was that the act authorizing the issue of these bonds is unconstitutional, and that therefore the city council is not liable for the same. The Circuit judge held that the question was concluded by the cases of *Copes v. City of Charleston*, 10 Rich. (Law) 491; *Gage v. Charleston*, 3 S. C. 491; *State v. C. & L. R. Co.*, 13 S. C. 290, and rendered judgment for the plaintiffs in both of these cases. From these judgments defendants appeal and present for our adjudication the single question as to the constitutionality of the law authorizing the issue of the bonds in question:

It is not denied that if the legislature could itself lawfully authorize the issue of the bonds, it could lawfully delegate such authority to the city council, and therefore the real question for us to determine is whether the legislature had the power to issue the bonds for the purposes stated. It will not be denied that the power to issue the bonds necessarily implied the power to levy taxes to provide for the payment thereof; and therefore the inquiry is narrowed down to the question whether the legislature has the power to levy taxes for the purpose of assisting private individuals

in carrying out private enterprises, even though such private enterprise may result in incidental advantages to the public.

The power to levy taxes is essential to the existence of any government, but it is not, and from the very nature of the subject cannot be, an unlimited power. Even in the absence of any express constitutional restriction it cannot be said that the power of the legislature to impose taxes is unlimited, for that would necessarily imply that the legislature, under the guise of imposing taxes might exercise the power of confiscation. Hence it seems to be universally conceded, even by those who are disposed to enlarge the taxing power of the legislature to its greatest extent, that a law authorizing taxation for any other than a public purpose is void. As is said by Cooley in his work on Constitutional Limitations (p. 487): "Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

In *Allen v. Jay*, 60 Me. 124; s. c., 11 Am. Rep. 185, it is said: "A tax is a sum of money assessed under the authority of the State on the person or property of an individual for the use of the State. Taxation, by the very meaning of the term, implies the raising of money for public uses, and excludes the raising it for private objects and purposes." In *Lowell v. City of Boston*, 111 Mass. 454; s. c., 15 Am. Rep. 45, we find this strong language: "The power to levy taxes is founded on the right, duty and responsibility to maintain, administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may

become necessary. It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." To the same effect see *Loan Association v. Topeka*, 20 Wall. 655, and *Parkersburg v. Brown*, 106 U. S. 487.

When in addition to this we find that the Constitution of 1868, in article I, section 41, expressly declares that "the enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people," we think there can be no doubt that even in the absence of any express restriction upon the taxing power of the legislature such power can only be exercised for some public purpose, and that whenever it is attempted to be exercised for a private purpose, it is the duty of the courts to declare such legislation void.

Our next inquiry is, whether the purpose for which the bonds in question were issued, and which necessarily involved the power to levy taxes for their payment, was a public purpose. The purpose, as declared by the ordinance, which has been ratified by the act of the legislature, was "to make loans of said bonds to such applicants as will build up and rebuild the waste places and burnt districts of the city of Charleston, or erect improvements upon their lots." That this was a private, and not a public purpose, seems to us clear. The real object was to loan the credit of the city to private individuals to afford them aid in repairing their losses occasioned by a disastrous fire. It was practically nothing more nor less than lending the credit and funds of the city to private individuals to aid them in building on their own lots dwellings, stores, warehouses, or such other structures as their interest or convenience might prompt, for their own individual use, and to promote their own individual comfort or gain. There was nothing whatever in it of a public nature. The public were not to have any interest in, or control over, the structures which were thus to be erected by the aid of the public funds, but they were for the sole use, and under the exclusive control, of the individual owners, precisely like any other private property owned by any other private individuals residing or owning property in the city.

We cannot conceive how it is possible to invest the manifest

purpose of this loan on the part of the city with a public character.

It is true that there would be incidental advantages accruing to the city by the increase of its taxable values, and in various other ways that might be suggested, but these are mere incidental advantages which attend any improvements made in a city, even where they are exclusively the work of private individuals, made with their own private funds, and cannot, therefore, have the effect of converting the purpose from a private into a public purpose. These views are fully sustained by the case of *Allen v. Jay*, *Loan Association v. Topeka*, *Parkersburg v. Brown*, and *Lowell v. City of Boston*, cited above.

It is argued however, and the Circuit judge rested his decision upon such argument, that the question is concluded by the decisions which maintain the constitutionality of acts affording aid in the construction of railroads. It is true that the constitutionality of such legislation seems to be settled by the weight of authority, though grave doubts have been entertained by some whose authority is entitled to the highest consideration as to the correctness of such decisions. Conceding however for the purposes of this case, that such legislation is constitutional, we think that it does not by any means follow that such decisions are conclusive of the question now under consideration. Most of these cases recognize fully the doctrine which we have laid down in this opinion, that the power of taxation is not unlimited, and that it cannot be exercised except for some public purpose. In one of the leading cases on the subject, *Sharpless v. Mayor of Philadelphia*, 21 Penn. St. 160; s. c., 59 Am. Dec. 759, in which BLACK, C. J., in an elaborate opinion, sustains the constitutionality of legislation in aid of railroad companies, that distinguished jurist expressly admits "that a law authorizing taxation for any other than public purposes is void," and he rests his decision upon the ground that the construction of a railroad is a public purpose, and hence that it is one of the objects for which taxation may be used.

So in *Olcott v. Supervisors*, 16 Wall. 678, while considering a similar question, Mr. Justice STRONG says: "No one contends that the power of a State to tax, or to authorize taxation, is not limited by the uses to which the proceeds may be devoted. Undoubtedly taxes may not be laid for a private use." But he goes on to argue that railroads, although owned and constructed by private corpora-

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tions, are public highways; that the right of eminent domain, which can only be exercised for public purposes, may be exerted to facilitate their construction; and that they are open to the use of the public under such regulations as may be prescribed, and therefore he concludes that the construction of a railroad is such a public purpose as to warrant the imposition of taxes in aid of its construction.

In *Dill Mun. Corp.*, § 105b, after speaking of the various decisions which seem to have established the constitutionality of legislation in aid of the construction of railways, that distinguished author says: "But it is obvious, from this statement of the grounds upon which the validity of such legislation rests, that it furnishes no support for the validity of taxation in favor of enterprises and objects which are essentially private. We consider the principle equally sound and salutary, that the mere incidental benefits to the public or the State, or any of its municipalities or divisions, which result from the pursuit by individuals of ordinary branches of business or industry, do not constitute a public use in the legal sense which justifies the exercise either of the power of eminent domain or of taxation."

We are satisfied that the conclusion reached by the Circuit judge cannot be sustained by the decisions sustaining the constitutionality of legislation in aid of the construction of railways.

It may be, and has been said, that while the power of taxation is limited, so that it can only be applied to a public purpose, yet it is for the legislature, and not for the courts, to determine what are public as contradistinguished from private purposes; and that when the legislature has passed an act granting aid to any enterprise, it must be assumed that they had first determined that the purpose or object which they had in view was a public purpose, as it cannot be properly assumed that the legislature would willfully transcend its constitutional powers. If, as we have seen, the power of taxation is limited by the use to which it is to be applied, and if the legislature is restricted in the exercise of the taxing power by the use to which the taxes are to be applied, it would be strange indeed if it was to be the final judge as to the limits within which its own power is restricted. This, as we have said, in discussing a similar question in the recent case of *Whaley v. Gaillard*, 21 S. C. 560, would amount to no restriction at all.

If the same body whose power is intended to be restricted is to

finally determine when it has reached the limits beyond which it is forbidden to go, there would be practically no limitations upon its powers. As we understand it, one of the very objects for which this court was constituted, was to determine finally, not only the construction, but also the constitutionality of the laws passed by the law-making power. True, as has been well said, in *Ex parte Lynch*, 16 S. C. 32: "It is a delicate thing to declare an act of the legislature unconstitutional. * * * Implied limitations of legislative power are only admissible where the implication is necessary. * * * The constitutionality of a law must be presumed until the violation of the Constitution is proved beyond all reasonable doubt, and a reasonable doubt must be solved in favor of legislative action, and the act be sustained." But when the legislature has clearly overstepped its constitutional powers, it is not only the right, but the duty of this court so to declare.

We are satisfied that it is settled beyond all dispute that the legislature has no power to impose taxes, except for some public purpose, and we think it equally clear, not only from reason, but from authority entitled to the highest consideration, that the purpose of the act under consideration was to aid private individuals in carrying out private enterprises, and therefore that the purpose of the act was private, and not public, although such enterprise might prove of incidental advantage to the public. In *Allen v. Jay, supra*, an act authorizing a town to loan its credit to certain private individuals to aid them in establishing a mill and factory in such town was declared unconstitutional, although the establishment of such an enterprise in the town would prove to be of incidental advantage to the public. In *Loan Association v. Topeka, supra*, an act authorizing the city of Topeka to issue bonds to be used in aid of the establishment by a private corporation in said city for shops for the manufacture of iron bridges and works of that kind was declared unconstitutional, because of the fact that the purpose to be accomplished was a private and not a public purpose, although it was conceded that the establishment of such works would be of collateral advantage to the public. In *Parkersburg v. Brown, supra*, an act authorizing the city of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing in or near said city was declared to be unconstitutional on similar grounds. Finally, in *Lowell v. Boston, supra*, an act which in no essential particular differs from the one now under consideration,

authorizing the city of Boston to issue its bonds and loan the same "to the owners of land, the buildings upon which were burned by the fire in said Boston," for the purpose of aiding such persons in rebuilding, was declared to be unconstitutional upon the same grounds, notwithstanding the magnitude of the calamity from the effects of which it was desired to relieve the sufferers.

Now, there can be no doubt that in each and all of these cases, as well as in the case now under consideration, the principal motives which prompted the legislature to adopt the legislation in question was the belief that thereby the public welfare would be promoted by securing the completion of enterprises which would add to the taxable values of the several towns or cities, and in various other ways promoting the interests of the public. But this was not held to be sufficient, and could not properly be so held; for the same reasoning would authorize the extension of aid to an enterprising private individual who desired to enlarge his business, and did not have the means of doing so without aid from the public treasury; for if his business was enlarged, the taxable values of the community would be increased, and many other incidental advantages would accrue to the public. Yet no one would contend that a grant of legislative aid in such a case would be valid, notwithstanding the incidental benefits which the public might thereby receive, because the purpose to which the public money was to be applied would be essentially private and not public, and therefore wholly unauthorized. So in the case now under consideration the purpose to which it is proposed to apply the public money is essentially private and not public. The buildings to be erected by the aid of the public money would still remain the private property of the owners, under their exclusive control and for their sole use, just as much so as any other private property in the city.

We are entirely satisfied therefore that the act in question is without constitutional authority and void. From this it follows that the bonds in question constitute no valid obligation of the city of Charleston, and hence no action can be maintained to enforce their payment.

It is argued however that the usage and practice of the various departments of the State government have so fully recognized these bonds that it is too late now to question their validity; and the case of *Harnden v. Moore*, 18 S. C. 339, is relied upon. That case however differs in many essentials from this. There the power of the

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Court of Probate to make partition of real estate had been repeatedly recognized both by the legislative and judicial departments of the government and rights had been acquired, titles vested, and money paid upon the faith of such recognitions of these two departments of the government, and to relieve parties who had thus acted upon the confidence which they might naturally repose in the combined action of these two departments of the government, the doctrine of *communis error facit jus*, admitted to be an exceptional doctrine, was applied. But in the case now under consideration, we do not find any such combined action of these two departments of the government. On the contrary, on every occasion where these bonds have been brought before the courts the constitutionality of the legislation authorizing their issue has been assailed; and we are not informed of any instance in which any court has assumed or acted upon the assumption that such bonds constituted valid obligations of the city of Charleston.

It is true that there are instances in which the old fire loan sterling bonds, issued by the State under the act of 1838, have been recognized as valid obligations, though no instance has been brought to our attention in which the constitutionality of the act authorizing their issue has been raised. But we are not dealing with that class of bonds. They were issued under the former Constitution of the State, and rest upon a different foundation from the fire loan bonds issued by the city of Charleston since the adoption of the Constitution of 1868, and it is the validity of these alone that we are now called upon to consider.

Again it is said that the city council of Charleston are estopped by their own acts from disputing the validity of these bonds; by paying interest on them from time to time, by purchasing them in the market, and by suing the bonds of private individuals to whom these fire loan bonds have been issued. If the city council was never invested with power to issue the bonds, it is difficult to understand how any act they might do could estop them from disputing their validity. If they could not create the obligation by the formal act of signing the bonds, through their proper officer, under the seal of the corporation, we cannot conceive what other act could give the bonds any greater validity. It may well be that it is not only the right but the duty of the city council to collect from those who have borrowed the amounts due by them, and apply the same to the payment of the fire loan bonds; and that by proper proceed-

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ings they may be compelled so to do, *Parkersburg v. Brown*, 106 U. S. 487, and *City Council Charleston v. Caulfield*, 19 S. C. 201, but that is not the question now before us. All that we are now called upon to determine is whether the bonds, from which the coupons sued upon in these cases were taken, constitute valid obligations of the city council of Charleston, which can be enforced by judgment; and we hold that they are not. That the payment of interest on these bonds does constitute an estoppel, see *Loan Association v. Topoka*, *supra*.

The judgment of this court is that the judgment of the Circuit Court in each of the cases named at the head of this opinion be reversed, and that the complaint in each of said cases be dismissed.

Judgment reversed.

HYRNE V. ERWIN.

(28 S. C. 201.)

Partnership—liability for negligence—physicians.

Where physicians are in partnership all are liable in damages for the professional negligence of one of the firm. (*See note, p. 18.*)

ACTION for mal-practice. The opinion states the case. The plaintiff had judgment below.

Robert Aldrich, for appellant.

J. J. Brown, contra.

SIMPSON, C. J. The appellants, father and son, are partners in the practice of medicine in Barnwell county. In December, 1881, the plaintiff had his arm broken by the falling of his horse, and the defendants were called in. Both attended in the first instance, but the case was principally managed afterward by Dr. C. W. Erwin, the son, both however attending occasionally. The plaintiff alleged that the attention given was so negligent and unskilful that he lost the use of his arm; that he is no longer able to engage in his accustomed pursuits; that he has been, and still is, disabled from attending to his ordinary business, whereby he has heretofore obtained support and maintenance for himself and family, to his

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damage \$5,000. The case was heard by Judge WALLACE and resulted in a verdict of \$1,000 for plaintiff. The appeal assigns error to the presiding judge at two stages of the case; the first involves his charge to the jury, and the second his refusal to grant a new trial on motion made on the minutes of the court after verdict.

The portion of the charge excepted to was as follows: The judge said "that when two gentlemen associate themselves together in the practice of medicine or law or any other scientific profession, each becomes surety for the other that he will faithfully and properly perform his engagements. And if either fail to display reasonable care, diligence and skill in the performance of his duties, both are liable." He further said: "That if the jury believed the plaintiff and his witnesses as they testified on the point of the setting of the arm by Dr. C. W. Erwin, and the plaintiff's complaint at the time the bandages were too tight, the great swelling of the arm and the discoloration of the fingers the next day, the earnest request of the plaintiff and his wife to him to loosen the bandages, his refusal and leaving the patient in this condition, and not returning for several days, when mortification had ensued in consequence, then this made out a case of wanton injury, in which event the defendant, C. W. Erwin, alone would be liable."

When these two portions of the charge are considered together, the law laid down by the Circuit judge seems to have been this, to-wit, that when two or more physicians are practicing their profession in partnership, reasonable care, diligence and skill on the part of each in the performance of their duties is guaranteed by each and all of them, and if either fails to exercise such reasonable care, diligence and skill in the management of a case intrusted to his care, resulting in damages, all will be responsible. If however a wanton case of mismanagement is made out against one alone, and damage result from this, the others would not be responsible. Was this error? Certainly not such an error if any as to give cause of complaint to either of the defendants. It did no harm to the younger Dr. C. W. Erwin, and it opened a door of escape for the elder Dr. J. D. Erwin, to which, according to strict law, it may be, he was not entitled.

The law applicable to such cases, as we understand it, is the same as that which obtains in the general doctrine of agency; it applies too in the relation of master and servant, and like cases. It is this: In a partnership the parties associated are, in one sense,

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agents of each other, and the act of one within the scope of the partnership or business is the act of each and all, as fully so as if each was present and participating in all that is done. And each guarantees that within the scope of the common business, reasonable care, diligence and skill shall be displayed by the one in charge. Or at least that a failure on the part of one thus to exercise such reasonable care, diligence and skill is a failure in law of each and all, and an injury resulting from such failure is the act of all. Where however the injury results from a wanton or willful act of one of the parties committed outside of the agency or common business, and not from negligence or the failure to bestow reasonable care, diligence and skill within the agency, then a different principle applies, to-wit, that the party doing the act and causing the injury is alone responsible—the distinction between the two cases growing out of the fact that the relation which the party doing the act bears to the others is different in the one case from the other. In the first, his act being within the scope of the business, he acts both for himself and as agent of the others; in the other his act, being beyond and outside of the scope of the business, he acts for himself.

It will be observed then that two things are necessary to make the principal responsible for the acts of the agent, under the doctrine of *respondet superior*, and the same doctrine applies to partnerships of the character under discussion. First, there must be negligence or a want of reasonable care, diligence and skill; and second, an injury must result from this. If either of these is absent, no responsibility attaches to any one, because it requires the presence of both to give rise to a cause of action. Now, an injury in a special case may be the result of an omission on the part of the agent or the party in charge to bestow proper care in doing what he is authorized and attempting to do. Or it may be produced by a direct act on his part within the scope of the business, which act reasonable care and the possession of reasonable skill would have forbidden. Or it may be produced by an act altogether outside of the business and not intended or calculated to further and advance said business. In the first two classes of cases the principal is liable, because here is negligence, the want of proper care within the scope of the business, and resulting in injury. And it makes no difference whether this negligence results from inattention, incompetency or wantonness. But in the last

class of cases, where the party causing the injury has stepped beyond the agency or common business, and committed an act either from wantonness or other motive, the act is his, and he alone can be made responsible. These principles, we think, will be found to be sustained by Story on Partnership, § 166, and the cases and authority cited there; by Cooley on Torts, and Wood on Master and Servant, 593 *et seq.* The charge of the judge is possibly susceptible of the construction that a wanton act of one partner, even within the scope of the business, would relieve the other parties, as he pointed out no distinction between such an act done within and one done without. But if this be so, yet as we have said above, neither of the defendants could complain for the reason given above.

The appellant complains however of the use of the word "surety" by the judge. It is true, as argued by appellant, that this precise term has not been employed in any of the cases involving the relation of partners to each other or in the elementary books on the subject, but we see no error in its use here. It certainly did not intensify, or make more rigid or binding, the responsibility of parties, growing out of partnerships, than if it had been omitted. In fact, its tendency was rather to modify that responsibility, as sureties on a note might possibly be released sometimes when partners would not be.

[Minor questions omitted.]

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Whittaker v. Collins*, Minnesota Supreme Court, December 7, 1885, the following is an abstract of the case: It appears from the complaint, in substance, that defendant and one Graff were copartners as practicing physicians and surgeons; that plaintiff's leg having been broken, he employed the firm to set it, and to care for and treat him professionally; that part of the time Graff attended him, and did his work skillfully, that the remainder of the time his partner, the defendant, attended the plaintiff, and performed his duties negligently and unskillfully, causing the injuries complained of. Both were acting in the line of their partnership business, and under and in pursuance of the employment of the firm professionally by the plaintiff. The court below having sustained a demurrer to the complaint on the ground of a defect of parties defendant, the sole question raised by this appeal is whether Graff, defendant's partner, should have been made a party defendant. The admitted rule is that in actions on contract all persons jointly liable must be sued, but that in actions for tort, disconnected from any contract, the tort-feasors need not be joined. The question is, what rule applies

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in what are sometimes called actions for torts founded on contracts or actions *ex quasi contractu*? The principle running through all the cases seems to be where the action is maintainable for the tort simply, without reference to any contract between the parties, the action is one of tort purely, although the existence of a contract may have been the occasion or furnished the opportunity for committing the tort. But where the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is in substance, whatever may be the form of the pleading, an action on the contract, and hence all persons jointly liable must be sued. 1 Chit. Pl. 87; Pom. Rem. 884; Dicey Parties, 455; 1 Lindl. Partn. 482; 2 Colly. Partn., § 732; *Powell v. Layton*, 2 Bos. & P. (N. R.) 865; *Mas v. Roberts*, 2 Bos. & P. (N. R.) 454; *Cabell v. Vaughan*, 1 Wm. Saund. 291e, 291f; *Weall v. King*, 12 East, 452; *Breitherton v. Wood*, 3 Brod. & B. 54; *Walcott v. Canfield*, 3 Conn. 198. According to this test it seems to us clear that this is an action on the contract. The gist and *gravamen* is the breach of its terms which whether express or implied, were that these physicians and surgeons would treat the plaintiff with ordinary professional skill and care. It would have been impossible for plaintiff to state his cause of action without alleging the contract, for the liability of the defendant arose solely out of it, and not out of some general common-law duty independent of contract. The only cases which appellant cites in support of his contention are *Govett v. Radnidge*, 3 East, 62, and *White v. Smith*, 12 Rich. 595. The first of these cases has been overruled, and is no longer considered law. The latter was an action for damages for the loss of a slave killed through the negligence of a partnership, while in their charge under a contract of hire. The court placed its decision wholly upon the ground that the *gravamen* of the suit was not the contract, but the negligence of the defendant, and that the contract was mere matter of recital to explain that the slave was in charge of the defendant, and adds: "Proof of any other process by which the charge resulted would have been admissible." At least this is the ground upon which the court decided the case, and is the only one upon which the decision can be sustained, if at all. But in the case at bar the foundation of the action is the contract, and the *gravamen* of it its breach. There is no force in the suggestion that Graff was not a necessary party because personally innocent. The same suggestion was made by counsel in *Powell v. Layton*, *supra*. The act of one partner in the line of the copartnership business is the act of all.

GUGGENHEIMER v. GROESCHEL.

(23 S. C. 374.)

Assignment for creditors — subsequent composition.

Where a debtor had made a general assignment for the benefit of his creditors, and the creditors all afterward made a composition with him, *held*, that the assignment was vacated, and the creditors must share equally.

ACTION on account for goods sold. The opinion states the case.

A. S. Douglass, for plaintiffs.

J. H. Rion, for Sternbach.

J. E. McDonald, for respondents.

SIMPSON, C. J. The defendant, Joseph Groeschel, on February 8, 1882, being then a merchant at Winsboro, Fairfield county, and insolvent, made an assignment of all his real and personal property, consisting of a stock of goods and a certain lot situate in said town, for the benefit of his creditors, in which certain named creditors were preferred, among them the defendant, Charles Sternbach. The defendant, Isaac N. Withers, was the assignee. Shortly after the execution of this assignment, a meeting of the creditors was had in pursuance of the statute in such case made and provided, at which meeting the said Isaac N. Withers was appointed agent of the creditors.

Before any thing was done by the assignee with the assigned property, Groeschel, the debtor, compounded with his unpreferred creditors by agreeing to pay them thirty-six per cent on their claims, this amount to be paid in four installments and in full of said claims, for which he gave notes, bearing interest from February 18, 1882, and payable to James H. Rion, as attorney for the creditors, all of which have since been paid. He also made satisfactory arrangements for the payment of the claims of the preferred creditors, all of whom have since been satisfied, except the defendant, Charles Sternbach, there being still remaining on his claim some \$1,200, after crediting a payment of \$1,000 made in August, 1882.

After this composition and arrangement, to-wit, in March, 1882,

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the assignee returned the stock of goods to Groeschel, the assignor, who immediately resumed his former business of buying and selling goods, commencing with this returned stock, in which he continued until January, 1884, depleting and replenishing his stock, from time to time, as the business required, and without interruption from any quarter. During this time he contracted many debts in the purchase of goods, and among them the plaintiffs'. In 1884, when the greater part of the stock, if not all, which had been returned to him by Withers, the assignee, had been exhausted and its place supplied by other purchases, being threatened by his subsequent creditors, Withers took possession, claiming, as it seems, under the original assignment. It does not appear whether this action of Withers was assented to or not by Groeschel. However Withers took possession and immediately sold the goods on hand. Out of the proceeds of the sale, Withers paid off the last of the four notes given by Groeschel to his unpreferred creditors mentioned above, and also a note to one J. Herbst, with certain expenses and commissions, leaving in his hands the sum of \$2,978.64.

At this juncture of affairs, the plaintiffs commenced the action below, claiming to be a creditor on account of goods sold and delivered on December 16, 1883, amounting to \$274.91, and demanding judgment: 1st. That the defendant, Isaac N. Withers, assignee as aforesaid, be enjoined from paying out of the funds or assets in his hands, or under his control, any balance that may be claimed to be due the defendant, Charles Sternbach, as a preferred creditor, or from making any other disposition or application of said funds, except as ordered by the court. 2d. "That the plaintiffs be paid their debt, or their proportionate share thereof, in the ratable and equitable distribution of the same among such of the creditors as may come in and establish their claims in this action." The defendants answered the complaint, admitting the facts alleged in the complaint, except the statement that the stock of goods taken by Withers in 1884 had entirely "changed its component parts" from the stock turned over to Groeschel under the composition agreement in 1882, which was denied. It was also denied that Sternbach had "concurred and acquiesced in and assented to the transfer and delivery of the assigned goods and assets to the said Groeschel by Withers, and that he made a new agreement with Groeschel as to his debt," and Sternbach claimed that he was enti-

tled to be paid the balance due him out of the funds in the hands of Withers as a preferred claim.

The case was ordered to a referee, with instruction to call in all creditors claiming to share in the distribution of the money in the hands of Withers. Under this call, three classes of creditors established their demands. 1. A preferred creditor under the original assignment who had not been paid in full, to-wit, Charles Sternbach, whose claim is mentioned above. 2. The unpreferred creditors under said assignment who had been paid their then existing claims, but who since that time had become creditors of Groeschel for goods and merchandise sold him, to-wit, Kerngood Bros. and Wiesenfeld & Co. And 3. Those who were not creditors at the time of the original assignment, but had become so since, to-wit, the plaintiffs. Upon the coming in of the report of the referee, which contained the testimony upon the issues raised in the pleadings and the claims established, the case was heard by his honor Judge COTHREN.

In the testimony reported, it appears that Kerngood Bros. and Wiesenfeld & Co., who as stated were unpreferred creditors of the original assignment, had received, by a private arrangement made with Groeschel in the composition with them, considerably more than thirty-six per cent on their claims, and the plaintiffs contended that they should account for this excess on their new claims now before the court. Plaintiffs also contended that the defendant, Charles Sternbach, having made a new arrangement with Groeschel as to his preferred claim, should be confined to that, and was entitled to nothing out of the funds in the hands of Withers.

His honor, the Circuit judge, sustained the plaintiffs as to Sternbach's claim, but overruled it as to Kerngood Bros. and Wiesenfeld & Co., and he ordered (1) that the funds in the hands of Withers be turned over to the clerk of the court for distribution; (2) that the clerk, after paying the costs, taxes, etc., distribute the balance *pro rata* among the creditors of Joseph Groeschel (excepting Charles Sternbach), who shall, under the usual form of publication by said clerk, present and prove their demands before him within sixty days from the judgment rendered, etc.

The plaintiffs have appealed from so much of the decree as allowed Kerngood Bros. and Wiesenfeld & Co. to share in the funds in contest without accounting for the excess received in the composition, and also from so much as directed the creditors to estab-

lish their demands over before the clerk. Sternbach appealed because his claim was ruled out, and also from so much of the decree as directed the funds to be turned over to the clerk and that the creditors should again establish their demands before him.

This is a novel case, and in some of its features without precedent in the books. The main, and as was said by the Circuit judge, the pivotal question, is the effect of the composition upon the original assignment. The Circuit judge held in substance that it annulled, cancelled the assignment and in this we think he was entirely correct. The object of the composition no doubt was to accomplish this, the creditors by their action at least assented to it, and the assignee carried it out by openly returning the assigned property to Groeschel, upon which he, Groeschel, again began to merchandize, continuing in the business for some two years without objection. We think these facts were entirely sufficient to authorize the conclusion of the judge, that the assignment was at an end. The assignment then being at an end, the property belonged to Groeschel, unincumbered, and by what right Withers afterward seized the stock of goods in question or upon what foundation the plaintiffs instituted the action below for the distribution of Groeschel's property among his creditors, we cannot exactly see. Groeschel is alive, and although insolvent, yet his property is not incumbered with conflicting liens, needing adjustment by the court. Nor has it become by the execution of any paper or agreement a common fund belonging to the creditors. But Groeschel has not objected, and we must suppose that Withers took possession by his consent, and that this transaction amounted to a verbal assignment by Groeschel of his property for the benefit of his creditors. In the absence of all objection by Groeschel, we must so regard it, otherwise the case has no status in court, the original assignment being cancelled.

What are the rights then of the parties under this view of the case? No creditor having a prior lien by judgment, mortgage, or otherwise over others, the property would be subject to be pro-rated among all. We cannot see how Kerngood Bros. and Wiesenfeld & Co. can be made to account for the excess which it is said they received in the settlement of their former claims, nor why Sternbach should be excluded altogether. All these parties have claims against Groeschel, his property is about to be distributed among creditors by his consent, no one of whom has a lien thereon, and if he does not object to these parties getting a share, who can?

It is contended however in reference to Kerngood Bros. and Wiesenfeld & Co., that under the law of assignments, where a composition takes place, if the debtor, by a secret agreement, pays more to one creditor than to another, the transaction is fraudulent, and the amount paid by the debtor may be recovered back. Pom. Eq. Jur., § 967. This, no doubt, is good law. But upon whom is such a transaction fraudulent? and for whose benefit can the amount thus fraudulently paid be recovered back? It is fraudulent upon the other creditors entitled under the assignment, and if voidable it is voidable by them, and by them alone. Because they are the only parties injured and consequently the only parties having a cause of action. Pom. Eq. Jur., § 967, *supra*; 1 Story Eq., §§ 378, 381. The plaintiffs here do not occupy the position of a creditor at the time of the original assignment. Their claims have been contracted since, and we find no authority warranting them to claim in a proceeding like that they have instituted here, that Kerngood Bros. and Wiesenfeld & Co. should refund the alleged excess. Suppose they were required to refund, what lien would the plaintiffs have upon the money, or what right would the court have in the absence of such lien to appropriate any portion to the plaintiffs? If there is any party before the court who has a right to complain, it is Sternbach. He was a creditor at the time of the assignment and was entitled to know the terms of the composition. But he makes no claim.

Next why should Sternbach be excluded altogether? It is said that he was amply secured under the assignment, being a preferred creditor, yet he allowed the goods to be restored to his debtor, and permitted him to resume and continue business for nearly two years, when he ought to have interposed and demanded payment of his claim. This, it is true, was enough to prevent him from now attempting to set up the assignment and claim as preferred creditor thereunder — perhaps so if even he could find and identify the assigned property, certainly so as to property since acquired by his debtor. But upon what principle can it be said that his debt should not be paid out of subsequently acquired property until all other debts are paid? It is contended by the plaintiffs, and by Kerngood Bros. and Wiesenfeld & Co., under the principle of *Goodhue v. Barnwell*, Rice Ch. 240, and other similar cases, he should be excluded. What is this principle? In the case of *Goodhue v. Barnwell*, the court held that if a creditor stands by and suffers the

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personal estate to be squandered, he will not afterward be permitted to look to the heir for payment. In *Richardson v. Inglesby*, 13 Rich. Eq. 59, an execution creditor allowed the bidder at sheriff's sale to take possession of the property without payment. It was held that the execution was satisfied.

The principle of these cases, and many others like them, is that a party will not be permitted to defeat other creditors on a certain fund by interposing a claim otherwise provided for, and which he has failed to secure out of the provided fund, on account of his negligence or bad faith. The doctrine of estoppel to some extent comes in. But it would be straining this principle very far here—indeed, much too far—to bring Sternbach within it, and altogether exclude his claim. That he surrendered his claim as a preferred creditor under the assignment was an act of kindness to Groeschel, his debtor. Certainly no creditor then in existence had the right to object. He was injuring no one but himself. After he surrendered, his claim as a preferred claim over the property assigned was gone, and gone forever; and how therefore can he be charged with standing by and allowing his debtor to squander this property? When he surrendered he then became a simple creditor, just like the plaintiffs and Kerngood Bros., and had no higher rights than they, nor any greater power than they, to stop Groeschel in his downward mercantile career. We can see no legal reason why Sternbach should not have a share in these funds, which it seems Groeschel has consented to be distributed among his creditors without preference.

It being conceded that there are no other creditors of Groeschel except those before the court, and there being no dispute as to the amounts established before the referee, it would be incurring costs and expenses unnecessarily to require these debts to be again established. We think the funds in hand, after paying off expenses allowed, should be distributed by the clerk of the court for Fairfield county among the plaintiffs, Kerngood Bros., Wiesenfeld & Co., and Charles Sternbach, *pro rata*, according to the amount of the claims of each. And to this end,

It is the judgment of this court that the judgment of the Circuit Court be modified as herein above. Let the case be remanded.

Case remanded.

UNION NATIONAL BANK V. ROWAN.

(28 S. C. 222.)

Banks — National — buying drafts.

A National bank may lawfully purchase a draft drawn in its favor by a seller of goods upon a buyer, with a bill of lading attached.

ACTION to recover goods. The opinion states the case. The plaintiff had judgment below.

W. S. Monteith, for appellants.

Clark & Muller, contra.

McIVER, J. The facts of this case, so far as necessary to a proper understanding of the points raised by this appeal, are substantially as follows: The defendants, Lorick & Lowrance, merchants, doing business in Columbia, ordered from Hord Bros. & Co., dealers in grain and provisions in Chicago, a lot of bran and oats. At the time of the shipment of these articles Hord Bros. & Co. drew drafts on Lorick & Lowrance for the price thereof, which were either discounted or sold to the plaintiff, upon the security of the bills of lading which at the same time were indorsed by Hord Bros. & Co. and delivered to plaintiff. These drafts were sent by the plaintiff, with the bills of lading attached, to its agent in Columbia, the Carolina National Bank, to be presented to the drawees for acceptance, and when so presented were not accepted. When the bran and oats reached Columbia they were seized by the defendant, Rowan, as sheriff, under a warrant of attachment sued out by the defendants, Lorick & Lowrance, on a claim which they alleged was due them by Hord Bros. & Co. growing out of some previous transactions. Thereupon this action was brought by the plaintiff to recover possession of the bran and oats.

It is not denied that the indorsement and delivery of the bills of lading to the plaintiffs passed the title and right to the possession of the articles mentioned therein to the plaintiff, provided the transaction was valid and legal, and this having been done prior to the seizure under the warrant of attachment, the plaintiff would have a right to recover. It is contended however by the appellants that

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under the National banking law of the United States the plaintiff had no authority to purchase the drafts with the bills of lading attached, and that therefore the transaction was *ultra vires*, illegal, and passed no title to the plaintiff. Accordingly the Circuit judge was requested by the defendants to instruct the jury, "that it was for the jury to decide whether plaintiff purchased or discounted the drafts, and that if they came to the conclusion that the plaintiffs purchased the drafts with the bills of lading, then the transaction was *ultra vires*, and the plaintiff could not recover." To the refusal of this request defendants duly excepted, and by their exceptions, the first having been abandoned, practically raise two questions of law: 1st. Whether the purchase of the draft, with the bills of lading attached, by the plaintiff, was *ultra vires*. 2d. If it was, does that defeat the plaintiff's right to recover?

It seems to us that as to the first question there can be no doubt. These papers, though called drafts, are in fact bills of exchange, as they fill any definition given of that species of instrument. That learned commentator, Mr. Chitty, commences his treatise on bills of exchange with these words: "A bill of exchange is defined by Mr. Justice BLACKSTONE to be an open letter of request, or an order from one person to another, desiring him to pay on his account a sum of money therein mentioned to a third person." These papers certainly are open letters of request or orders from Hord Bros. & Co. to Lorick & Lowrance, desiring them to pay on their account the sums of money therein mentioned to a third person, as is manifest from their form, which is as follows:

"\$270.66.

CHICAGO, Dec. 3, 1883.

"At sight, N. Y. Exchange, pay to the order of Jno. J. P. Odell, cashier, two hundred and seventy 66-100 dollars, value received, and charge to account of Lorick & Lowrance, Columbia, S. C.

HORD BROS. & Co."

Now as a National bank is expressly authorized by the act of Congress to buy and sell exchange, there cannot be a doubt that the plaintiff had a right to purchase these papers, called drafts, as they were in fact bills of exchange, and hence it was wholly immaterial to inquire whether the plaintiff bought or discounted these papers. Indeed, it seems to us that any other view would, to some extent at least, defeat the very object for which a bank is established. As we understand it, one of the main purposes of these institutions is to afford the means of moving the produce of the country by facil-

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itating exchanges, and such transactions as the one now in question are just what would most likely effect these ends. We think therefore that the plaintiff bank, in buying these bills of exchange, even if it did buy them, was not only not going beyond the authority vested in it by the act of Congress, but on the contrary, was simply doing one of the things for which it was constituted. It is apparent therefore that the authorities cited by the counsel for appellants, tending to show that a National bank has no authority under the act of Congress to buy promissory notes, have no application to this case, and need not therefore be considered.

Under this view, the second question raised by this appeal cannot arise, though we may say that this question also has been determined adversely to the view of the appellants by at least two cases, *Nat. Bank v. Matthews*, 98 U. S. 621, and *Nat. Bank v. Whitney*, 103 U. S. 99, decided by the Supreme Court of the United States, the tribunal invested with jurisdiction to determine finally the proper construction of an act of Congress.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

CALVO V. CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(28 S. C. 526.)

Master and servant — fellow-servants — locomotive engineer and track-repairers.

A railway locomotive engineer and a section-master of track-repairers are not fellow-servants within the rule as to master's liability for injury by one servant to another.*

ACTION for personal injuries by negligence. The opinion states the case. The defendant had judgment below.

J. M. McMaster, for appellant.

J. H. Rion, contra.

McIVER, J. The plaintiff, who is a locomotive engineer, brings this action to recover damages for an injury sustained while serving

* See *Tiernay v. Minneapolis, etc., R. Co.* (83 Minn. 811). 58 Am. Rep. 85.

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the defendant in that capacity. It seems that on March 22, 1881, the defendant was directed to take an extra freight train from Columbia to Charlotte, which train was to be run under the signals of a passenger train which preceded him. On reaching a point between Cornwall and Chester plaintiff's engine was thrown from the track, whereby he received the injuries complained of. It appears that one Wooten, a section-master and supervisor of the track-laying force, had taken up the track at that point for the purpose of repairs, and that this was the cause of the disaster.

The testimony tended to show that Wooten disregarded the signal carried by the preceding passenger train, which indicated that it was followed by another train, and did not wait for the passage of such train, as required by the rules of the company, before taking up the track; and also neglected to place the proper signal to warn an approaching train that the track was not in condition to be used, as required by another rule of the company.

At the close of the testimony, the defendant's counsel submitted a motion for a nonsuit, "on the ground that the defendant was not liable for the injury, for it was the result of the negligence of a fellow-servant, viz., that the plaintiff, Calvo, was a fellow-servant with Wooten, the section-master." The motion was granted, though upon what ground is not stated in the order granting the motion, but as there was certainly some evidence of the negligence of Wooten, we will assume that it was upon the ground that the plaintiff and Wooten were fellow-servants, and that therefore the company was not liable, as this seems to be assumed in the argument.

So the only question for us to determine, is whether a locomotive engineer and a section-master are fellow-servants in the sense that the company would not be liable to one for the negligence of the other. The question as to who are fellow-servants in this sense has given rise to no little conflict of opinion, and the decisions elsewhere are conflicting. The only cases in this State where this question has been distinctly considered are *Gunter v. Graniteville Manufacturing Co.*, 18 S. C. 262; s. c., 44 Am. Rep. 573, followed by *Lasure v. Graniteville Manufacturing Co.*, 18 S. C. 275, and recognized in *Couch v. Charlotte, Columbia & Augusta R. Co.*, 22 S. C. 557. It is there determined that in order to ascertain whether a given employee is the representative of the master, or a fellow-servant with other employees, "the true test is whether the

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person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow-servant or co-laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him, must be regarded as the negligence of the master."

So that the practical inquiry in this case is, whether Wooten, the section-master, was the representative of the defendant. Was he employed to do any of the duties of the company? If so, then the company is liable to the plaintiff for any injuries he may have sustained by reason of the negligence of Wooten. But if not, then the company would not be liable. As we understand it, the main duty of the section-master is to keep the track in order so as to insure, as far as practicable, the safety of the trains continually passing over it. Now it is well settled that it is the duty of the master, not only to provide his servants, in the first instance, with suitable and safe machinery and other appliances to do the work for which they are employed, but also to keep the same in proper repair, and any negligence in the performance of such duty, whether done by the master in person, or by subordinate agents selected by him for the purpose, would render the master liable for any injury sustained by one of his servants by reason of such negligence.

In the case of corporations this duty, as well as all others, must necessarily be committed to subordinate agents, and the fact that these subordinate agents, as in the present case, are subjected, in the performance of such duty, to the supervision of other and higher officers, cannot affect the question. The fact that the section-master is under the supervision of the road-master, and he in turn is under the supervision of the general superintendent, does not alter the nature of the duty which he is employed to do. The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants? Under the well-settled rule above mentioned, we think that nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotive engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty is the negligence of the company.

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These views are fully supported, not only by *Gunter's case*, *supra*, and the authorities therein cited, but also by other cases. In *Lewis v. St. Louis & Iron Mountain R. Co.*, 59 Mo. 495; s. c., 31 Am. Rep. 385, it was held that the company was liable to a brakeman for injuries sustained by reason of negligence of the section-master, to whom was committed the duty of keeping the road-bed in proper repair, in performing that duty. The court held that they were not fellow-servants, and that the negligence of the section-master was the negligence of the company. The court, after laying it down as an established rule that it is the duty of a railroad company to keep its road-bed in proper repair, so as to insure, as far as practicable, the safety of those who may use it, whether passengers or servants, and after saying that this duty was committed to the section foreman or master, used this language: "It is true, in one sense, the section foreman, whose duty it was to superintend the track and keep it clear and safe, was a fellow-servant, as all are, to a certain extent, fellow-servants, who are engaged in the same business or enterprise; but he represented the company in the line of his duty—he was the company in that regard—and his negligence was the company's negligence, in a matter in which it owed a duty and obligation to its servants."

In *Davis v. Cent. Vt. R. Co.*, 55 Vt. 84; s. c., 45 Am. Rep. 590, it was held that where a fireman was killed by the washing out of a culvert, caused by the negligence of the company's bridge builder in constructing and of the road-master in repairing the culvert, although they were ordinarily skillful and careful in their several employments, the company was liable, upon the ground that it was the duty of the company to provide and maintain a safe road-bed, and the negligence of the subordinate to whom this duty was committed was the negligence of the company. This is the language used by the court: "The bridge builder and road-master, while inspecting and caring for the defectively constructed culvert, were performing a duty, which as between the intestate and defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant."

The case of *Moon v. Richmond & Alleghany R. Co.*, 78 Va. 745; s. c., 49 Am. Rep. 401, was very much like the one now under consideration. It was there held that a section-master and train hand or brakeman were not fellow-servants in the sense that would exempt the company from liability for injuries sustained by the

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train hand by reason of the negligence of the section-master. The court said: "Where a company delegates to an agent or employee the performance of duties which the law makes it incumbent on the company to perform, his acts are the acts of the company—his negligence is the negligence of the company"—and then went on to show that it was the duty of a railroad company to provide and maintain a suitable and safe roadway for the use of its trains. See also the case of *Gilmore v. Northern Pacific Ry. Co.*, 15 Am. & Eng. Railway Cas., 304, where many authorities upon the subject are collected in a note.

Under the view which we have taken of this case, the question whether the rule which exempts a master from liability for injuries sustained by one of his servants, by reason of the negligence of a fellow-servant, should be abrogated, which was so elaborately argued by the counsel for appellant, does not arise, and has not therefore been considered.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

Judgment reversed.

DARWIN V. CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(23 S. C. 331.)

Railroad — negligence — trespasser riding on pilot.

Where a trespasser rides on the pilot of the engine of a railroad construction train, in violation of the rules of the company but with the assent of the engineer, and is injured in consequence, the company is not liable. (See note, p. 43.)

ACTION for death of plaintiffs' intestate by negligence. The opinion states the case. The plaintiff had judgment below.

J. H. Rion, for appellant.

W. B. Wilson, contra.

McIVER, J. On June 27, 1884, the plaintiff's intestate was killed on the Chester and Lenoir Narrow Gauge railroad under the fol-

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lowing circumstances, and this action is brought by the plaintiff, as his administrator, against the defendant company, lessees of said railroad, to recover damages occasioned by such killing. The engineer in charge of a construction train uncoupled his engine from the train to which it was attached and went down the road for a supply of water, the deceased going with him on the engine. Returning, Darwin was riding on the pilot of the engine, and when it reached the cars it collided with them and Darwin was crushed between the engine and the cars, causing his immediate death.

There was some testimony tending to show that at the time of the collision the engine was running faster than usual when coupling; and a railroad engineer who was examined as a witness testified that the speed of the locomotive at the time of the collision must have been at least four miles an hour, too fast for approaching a train of cars for coupling. The engine was in good order, and when examined, immediately after the accident, the brakes were found to be wound up tight. The pilot is the most dangerous place for one to ride on, and one of the printed rules of the company, put in the hands of every engineer on the road, was that the engineer should not allow any one, except the firemen or road-master to ride on the engine under penalty of discharge. There was no positive testimony that the engineer knew that Darwin was on the engine at the time of the accident, though two colored women standing on the side of the track opposite the point where the collision took place testified that the engineer could have seen him. This is a very brief statement of the testimony, which is set out in full in the record.

On the close of the testimony for the plaintiff, the defendant's counsel moved for a nonsuit upon two grounds. 1. Because "there was no sufficient proof of any negligence" on the part of the company. 2. Because "the undisputed proof of the plaintiff established beyond a reasonable doubt that the deceased had been guilty of gross contributory negligence." The motion was refused, and the defendant offering no testimony, the case went to the jury.

The defendant amongst other things requested the judge to charge "that if the jury find that the engineer was violating the rules of the defendant in allowing the deceased to ride upon the pilot of the engine, then the defendant is not liable for the killing." This request was refused, "because there was a neglect of duty upon the part of the defendant shown; for it was the duty of the company

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to employ engineers who are faithful in the discharge of duty." The next request was "that the defendant is not liable for the result of the unauthorized act of the engineer, done against its rules, and resulting from the voluntary act of the one killed." This request was also refused, for the same reason as that given above.

The judge was next requested to charge "that even if the jury are satisfied that in this case the defendant is responsible for the acts of the engineer, and the engineer was guilty of great negligence and want of care, yet the plaintiff cannot recover if the deceased was also guilty of contributory negligence; that is to say, that he did not observe proper care under the circumstances." To this request the Circuit judge responded as follows: "This, gentlemen, brings in the exception under which this case comes to you, and on account of which I refused the nonsuit asked. If the defendant, by its agent, knew that this young man was there and did not take proper care not to injure him, then the defendant is responsible for the result."

The last request was in these words: "That if the deceased failed to observe proper care under the circumstances, the plaintiff cannot recover." To which the judge responded as follows: "I refuse this for the same reason as the last request to charge. If the deceased was in a place of danger, and the agent allowed him to remain there and by carelessness ran into the cars and killed deceased, then the company is liable. * * * Suppose you come to the conclusion that the engineer, not using due care and proper caution, knowing that the young man was in that place of danger and by his neglect and want of proper caution caused the death, then the company is liable. It was the duty of the agent, seeing him in that place of danger, to warn him off; and seeing he did not get off, to use such care and caution in the management of his engine so as not, if practicable, to injure the lad. If he failed so to do, the company is liable. In the *Jones* case, which you heard read from Otto, the point is this, that the engineer did not know, as the agent did in this case, that the cars were on the track in the tunnel, forming the obstruction."

The jury having rendered a verdict for the plaintiff, defendant appeals, alleging error in refusing the motion for nonsuit upon both of the grounds taken, and in refusing the requests to charge as above stated.

It is essential to bear in mind, throughout the consideration of

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this appeal, that this is not the case of a passenger or even of an employee, who is understood to assume the risks incident to his employment, who has been injured on defendant's railroad; but it is a case of a bald trespasser who without lawful authority intruded himself upon defendant's engine, and was there injured. It must be manifest that a railroad company does not owe the same duty to a trespasser that it does to a passenger or one of its employees, though we do not go to the extent of holding, as some of the cases (*Duff v. Alleghany R. Co.*, 91 Penn. St. 458; s. c., 36 Am. Rep. 674; and *Cauley v. Pittsburgh, etc., R. Co.*, 95 Penn. St. 398; s. c., 40 Am. Rep. 664) seem to do, that a railroad company owes no duty to one who trespasses upon its tracks or unlawfully intrudes himself upon its engines or cars. No one can safely disregard the ordinary instincts of humanity and shield himself from responsibility for an injury done, even to a trespasser, by its wanton or reckless disregard of such instincts.

So far as we are informed, there is no case in this State which defines the measure of duty which a railroad company owes to one who unlawfully intrudes upon its engines or cars. The nearest approach to it is the case of *Carter v. C. & G. R. Co.*, 19 S. C. 20, in which the action was brought to recover damages for an injury sustained by a trespasser upon the track of the defendant company. In that case, the court, in speaking of one of the requests to charge, used this language: "So, too, although the second part of the request may have been good technical law, to-wit, 'that if the deceased was upon the track of the defendant without lawful authority, and using it for his own convenience, he was a trespasser, and the company were under no obligation to take precautions against possible injuries to trespassers,' yet this principle could not have shielded the defendant from such injury as may have been produced by its negligence, if any, in every case without exception. It would, no doubt, require a much stronger case to make out negligence as to a trespasser than is required in ordinary cases, but we have found no case which goes to the extent of declaring that a trespasser has no protection." Citing 2 Thomp. Neg. 1162, in notes.

Now the rule as laid down in *Gunter v. Graniteville Man. Co.*, 15 S. C. 456, in reference to the liability of a master for an injury sustained by one of his servants by reason of the negligence of a fellow-servant, is that the master is not liable unless he has been guilty of negligence in selecting or supervising such fellow-servant. The

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court there uses this language: "Where an injury has happened to a servant or employee, the master's liability is fixed as follows: * * * If it results from defective machinery or the negligent act of a co-servant with the injured party, he is not responsible unless the proof shall go further and show that the master's negligence or want of reasonable care in purchasing and overlooking his machinery, or in employing and supervising his servants, was the cause of his having defective machinery in use and negligent servants engaged." Assuming, in this case, that the disaster which resulted in Darwin's losing his life was caused by the negligence of the engineer, yet if Darwin had been a fellow-servant of the engineer instead of a trespasser, under the rule just stated the plaintiff could not recover against the company unless the proof went further and showed negligence either in the employment or the supervising of the engineer.

And shall the company be held to owe a higher duty to a trespasser than it does to one of its servants? Shall it be held responsible in damages to a trespasser, when under the same state of facts it would not be responsible to one of its employees? In this case there is not the slightest evidence that the company had been guilty of any negligence in employing the engineer, or that it knew, or had any reason to suspect, that he was negligent in the discharge of his duties. Nor was there any testimony tending to show that the company had been negligent in supervising the conduct of the engineer; on the contrary, the testimony shows that stringent orders, under a heavy penalty, had been placed in the hands of all engineers, doubtless designed to prevent just such accidents as here occurred. Of course, we need scarcely add that this rule would not apply in the case of a passenger to whom the company owes a much higher duty. Even therefore if it be assumed that there was evidence of negligence on the part of the engineer, we do not see the slightest evidence of any negligence on the part of the company, and hence the nonsuit ought to have been granted upon this ground.

The second ground upon which the nonsuit was claimed cannot be sustained under the case of *Carter v. C. & G. R. Co.*, *supra*. Contributory negligence is a matter of defense, and presents a question of fact to be solved by a jury.

The first and second requests were, as we have already shown in discussing the question of nonsuit, improperly refused in this case

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where the question is as to the liability of the company to a trespasser. The fact that the engineer was negligent in this particular instance was no evidence that he was habitually so, and much less was it any evidence that the company knew it, or that it had been guilty of negligence in employing him. All misconduct must have a beginning, and so far as the testimony shows, this was the first and only act of negligence on the part of the engineer. Certainly there was no testimony tending to show that the company, at the time the engineer was employed, or afterward, knew or had any reason to suspect that he was, or was likely to be, negligent in the discharge of his duties. While therefore the reason given by the Circuit judge for refusing these requests might have been sufficient if the question was as to the liability of the company for an injury sustained by a passenger, we do not think such reason sufficient in a case of this kind.

The other requests to charge which were refused involve the law as to contributory negligence. The rule upon this subject is laid down in the case of *Gunter v. Graniteville Man. Co.*, *supra*, in the following language: "The question in all the cases seems to be, has the damage or injury complained of been occasioned entirely by the negligence or improper conduct of the defendant, or notwithstanding such improper act of defendant, would the injury have been avoided but for the negligence or want of ordinary care of the plaintiff? In the former case, the plaintiff is entitled to recover. In the latter, the defendant is entitled to the verdict. * * * In other words, the courts cannot undertake in these cases to solve the problem how far such party may have contributed to the unfortunate result and by this means assess the damages on each *pro rata*. The only question that can be considered is, has the defendant entirely caused the injury? If so, he is responsible. If however the injury could have been avoided by reasonable or proper care on the part of the plaintiff, then the defendant is held harmless.

This is an authoritative statement of the rule, and what is more, it is well sustained by reason. It certainly would be very unjust to allow a person who has sustained an injury by the negligence of another to recover damages for such injury when it is made to appear that he himself contributed by his own negligence to the cause of such injury, or when by proper care on his part he might have avoided it altogether. This would, in effect, be giving one

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compensation for his own default, and would amount to the offer of a premium for negligence or want of proper care of one's own person.

In *Railroad Co. v. Jones*, 95 U. S. 439, the plaintiff, who was employed by the company in repairing its roadway, while being transported from his place of work by a train to which was attached a box car for the hands to ride in, was riding on the pilot of the engine, when by a collision with other cars in a tunnel which had become detached from another train, was severely injured, and brought his action for damages. The defense was contributory negligence. The court said: "One who by his negligence has brought an injury upon himself cannot recover damages for it. * * * But where the defendant has been guilty of negligence also in the same connection, the result depends upon the facts. The question in such cases is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not."

This case is identical in principle with the one now under consideration, for it will be found upon examination that the points of difference pointed out by the Circuit judge and the counsel for respondent were not regarded as material by the court. The distinction alluded to by the Circuit judge, that there the engineer did not know, as the engineer did in this case, that the cars were on the track in the tunnel, forming the obstruction, does not very clearly appear in the case; and on the contrary, the court uses this language: "The facts with respect to the cars left in the tunnel are not fully disclosed in the record." But even assuming that the engineer did not know that the cars were in the tunnel, this fact could only bear on the question of defendant's negligence, and the court said expressly that "for the purposes of this case, we assume that the defendant was guilty of negligence."

So the language quoted by respondent's counsel that "the plaintiff was on the pilot at the time of the accident without the knowledge of any agent of the defendant," while it is found in the opinion of the court, is in that portion of it where the learned justice is

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stating the testimony adduced by the defendant, and does not occur in that part of the opinion where the question of contributory negligence is discussed. On the contrary it is there said: "The knowledge, assent or direction of the company's agents as to what he (alluding to the plaintiff) did is immaterial." Again it is said: "The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his (the plaintiff's) part. Without the latter the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as any thing short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down." Accordingly it was held that the plaintiff was not entitled to recover.

The case practically decides that where one voluntarily places himself in a position on a railroad train known to be dangerous, he cannot recover damages from the company for injuries sustained by a collision upon the ground of contributory negligence, even though his position was known to the agents of the company, and the collision was occasioned by defendant's negligence. This decision therefore fully sustains the view which we take of the case now under consideration. Indeed the present case is much stronger than the one just cited. Here the deceased was on the engine without authority, where he had no right to be, and voluntarily placed himself in a position which the evidence shows was the most dangerous place he could have selected, and in so doing was clearly guilty of contributory negligence. The unfortunate result was due to his own unlawful and reckless act; and even if the defendant had also been guilty of negligence, he should not be permitted to recover damages for an injury to which he himself contributed, although the engineer may have known that he was in such a dangerous place and did not warn him off.

In the case of a passenger the rule would be different, for in such case it is the duty of the company, through its conductor, to look after the comfort and safety of the passengers, and if one of them is known to be in a dangerous position on the train, it would be the duty of the conductor to warn him of his danger; and if he failed

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to do so, it might be regarded as equivalent to the consent of the company, through its agent, to carry safely such passenger, even in such dangerous position. But to a trespasser the company owes no such duty: The company is not bound to assume, or even expect that trespassers will intrude themselves into dangerous places upon their trains, and is therefore under no obligation to provide for their safety by warning them of the danger of their unlawful and reckless acts; but in the case of passengers, whom the company does expect and invite to travel upon their trains, they are under obligation to look after their safety, and if such duty is neglected by their agent appointed for that purpose, they would be liable for the damages resulting from such neglect.

In *Flower v. Penn. R. Co.*, 69 Penn. St. 210; & c., 8 Am. Rep. 251, an engine, tender and one car ran from the station where the train had stopped down to a water tank, in charge of the fireman, who asked a boy about ten years old standing there, to put in the hose and turn on the water. While the boy was climbing up the tender to comply with the request, some detached cars, belonging to the train, came down with ordinary force and struck the car next to the tender, whereby the boy was thrown down and crushed to death, and the court held that the company was not liable. In the opinion it is said: "The true point of this case is, that in climbing the side of the tender or engine, at the request of the fireman, to perform the fireman's duty, the son of the plaintiff did not come within the protection of the company. To recover the company must have come under a duty to him, which made his protection necessary. * * * Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection. * * * The only apology for his presence there is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act."

In *Eaton v. Del., L. & W. R. Co.*, 57 N. Y. 382, reported also in 15 Am. Rep. 513, plaintiff was invited by the conductor of defendant's coal train to ride on the train, which was never used to transport passengers, and on the contrary, by the printed regulations of the company, of which however the plaintiff had no notice, passengers were forbidden to ride on coal trains. While on the train the plaintiff was injured through the negligence of the employees of the company; *held*, that the company was not liable. The court said that the unauthorized act of the conductor in invit-

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ing the plaintiff to ride on the train could not be attributed to the company so as to create the relation of carrier and passenger, and thereby impose upon the company the duty of care in the transportation of the plaintiff; that he could only be lawfully on the train by an authorized act of the conductor. "It is not necessary to consider whether he was a trespasser. It is enough to hold that a duty to be careful toward him could only spring up on the part of the defendant by an act on the conductor's part, coming within the scope of his authority."

In *Everhart v. Terre Haute & Ind. R. Co.*, 78 Ind. 292; s. c., 41 Am. Rep. 567, the plaintiff, who was not in the employ of the company, at the request of one of its employees, got on a slowly moving car and applied the brakes. While so occupied he was injured by a collision with other cars, caused by the negligence of other employees, and it was held that he had no remedy against the company. The court said that he was not "in any better condition, legally, than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because, as we have seen, he was not requested or directed to get upon the car and apply the brake by any one having power from the defendant to authorize him to do so. The defendants owed him no duty, either as an employee, passenger or traveller upon a highway crossed by the railroad."

In *New Orleans, Jackson, etc., R. Co. v. Harrison*, 48 Miss. 112; s. c., 12 Am. Rep. 356, the conductor of a train ordered a boy, fifteen years of age, not in the service of the company, to uncouple the cars, notoriously a dangerous duty, especially to an inexperienced person, and he was injured by the negligence of the defendant's servants. *Held*, that he could not recover from the company, the court saying, amongst other things: "If uncoupling the cars was voluntary by Harrison, it was an act of most extraordinary rashness and folly, and one which contributed directly to the injury. It is not the degree of his carelessness however which exonerates the company, but the question to be determined is whether his negligence contributed to the injury of which he complains. It is enough to defeat him if the injury might have been avoided by his exercise of ordinary care, and this rule is based upon grounds of public policy, which require, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected of him."

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From these cases it will be seen that the fact that it was known to the conductor or other officer in charge of a train that the person injured had, by his own recklessness, placed himself in a dangerous position, does not affect the question and that such fact cannot have the effect of overcoming the defense of contributory negligence. It is true that there are cases, many of which were cited by respondent's counsel, tending to establish an exception to the general rule as to contributory negligence, to the effect that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, could by the exercise of ordinary care and diligence have avoided injuring him; but no such exception has been recognized by the courts of this State, by the Supreme Court of the United States, or by many of the States. In *Gunter's* case, cited above, the defendant must have been aware of the danger to which the plaintiff was exposed in operating the loom in the condition in which it was, and yet it was laid down, without qualification or exception, that if the negligence of the plaintiff contributed to the injury, she could not recover, notwithstanding the negligence of the defendant.

It seems to us that the correct rule is laid down in *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; s. c., 30 Am. Rep. 185, where the cases *pro* and *con* are collected in a note — that contributory negligence ceases to be a defense only where the injury complained of is shown to have been done willfully or purposely; or we would add, where it was the result of such gross negligence as would imply wantonness or recklessness.

We think therefore that the Circuit judge erred in refusing to charge the two last requests of defendant, and that the mere fact that the engineer knew that the deceased was in a place of danger and did not warn him off, would not make the company liable, if the deceased, by his own negligence, recklessness or want of care contributed to the injury which he sustained.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

SIMPSON, C. J., and MCGOWAN, J., concurred in the result.

Judgment reversed.

NOTE BY THE REPORTER.—The same was held where a man gave the fireman half a dollar to let him ride on the pilot. *Rucker v. Mo. Pacific Ry. Co.*, 61

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Tex. 499. In *Webster v. Rome, etc., R. Co.*, 40 Hun, 161, the action was brought to recover damages for personal injuries sustained while riding in a baggage car in one of the defendant's trains. The plaintiff left the passenger car and went into the baggage car to smoke, sitting on a trunk, and finding there the baggageman and another passenger. While he was there the conductor came in and had a conversation with him as to the train being late. The train ran into a freight car, which had been blown from a side track upon the main track, and the plaintiff was injured. The sleeping car of the train went through the passenger car, killing eight persons and injuring others. *Held*, that the question as to whether the plaintiff was guilty of contributory negligence in going into the baggage car was properly left to the jury. The court said: "The question whether the plaintiff was guilty of contributory negligence is one of more difficulty. The statute provides that 'in case any passenger on any railroad shall be injured while on the platform of a car, or on a baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury, provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers.' Laws of 1850, ch. 140, § 46. It does not appear that any printed regulations of the company were posted in its cars, and consequently the plaintiff cannot be said to have violated any of the regulations of the company in going into the baggage car. Ordinarily the baggage car is a place of greater danger than the passenger coach, but on this occasion it turned out otherwise, for the first sleeping car smashed entirely through the passenger coach, breaking it in two, and killing a number of the passengers. Undoubtedly a passenger who voluntarily rides in a baggage car, or other known place of danger, in violation of the known rules of the company, when there is room in the passenger coaches provided for his accommodation, and is injured in consequence of such violation, cannot recover damages therefor. 2 Wood's Railway Law, § 804, and authorities there cited. But in this case there were no rules of the company prohibiting passengers from riding in the baggage car; on the contrary, they appear to have been permitted to so ride by the agents of the company in charge of the train. Another passenger was riding in the baggage car at the time the plaintiff entered. The baggageman was there, and shortly after the conductor entered. The conductor conversed with the plaintiff, but does not appear to have warned him against riding in that car. * * * In *Carroll v. New York and New Haven Railroad Co.*, 1 Duer, 571, it was held that a passenger injured by two trains of cars, running in opposite directions, coming in collision, is entitled to recover, although at the time of the collision he was in an apartment of the baggage car, notwithstanding the fact that he knew the position to be much more dangerous in the event of a collision than a seat in the passenger car, and that too though the result may have demonstrated that he could not have been injured if he had been in a passenger car. This case is very much in point, and so far as we have been able to discover, it has not been criticised or overruled, but is recognized as correct in the case of *Eaton v. Delaware, Lackawanna and Western R. R. Co.*, 57 N. Y. 396; s. c., 15 Am. Rep. 513

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and by Wood in his recent work on Railway Law in section 304, *supra*. In *Nolan v. Brooklyn City and Newtown Railroad Co.*, 87 N. Y. 68; a. c., 41 Am. Rep. 845, it is stated, in the opinion of the court, that 'it is settled that independent of the mandate of the statute * * * it is not, even in the case of steam cars, negligence *per se* for a passenger to stand on the front platform of a moving car.' In *Werte v. Long Island Railroad Co.*, 93 N. Y. 650, it was held that 'the fact that a passenger, failing to find a seat, and having none pointed out to him by any employee of the company, takes a position on the platform of the car where other passengers are riding, and without objection from any employee, and is thrown from the car by a sudden lurch given it by the great and increased speed with which the train is run when turning a curve, does not, as matter of law, establish contributory negligence.' In *Goodrich v. Pennsylvania and New York Canal and Railroad Co.*, 29 Hun, 50, we were called upon to determine, in some respects, a similar question to the one now under consideration. We then reached the conclusion that under the circumstances of that case the question of contributory negligence was one for the jury. In that case we regarded the evidence tending to establish contributory negligence even stronger than the evidence presented in this case. Whilst the conclusion in that case was reached with some hesitancy, we are still inclined to the opinion that it should be followed in this case, and that the question of contributory negligence was one properly submitted to the jury."

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(28 S. C. 578.)

Statute of limitations—payment by joint debtor.

Payment by one joint debtor cannot avoid the effect of the statute of limitations as to another. (*See note, p. 52.*)

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

LeRoy F. Youmans, for appellants.

Clark & Muller, contra.

MCIVER, J. On May 29, 1872, P. W. Kraft, Anna O. Kraft, and E. F. Hei, executed their joint and several promissory note, whereby they promised to pay to the plaintiff or bearer thirty days after the date thereof \$500 with interest at two per cent per month if not paid at maturity. The interest was regularly paid each year

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by P. W. Kraft, the principal debtor, the other two parties being his sureties, the last two payments of interest being dated, one on June 1, 1877, and the other on June 1, 1878, the latter being acknowledged to be for interest to January 1, 1879, on which day there was another payment by P. W. Kraft on account of the principal. The action was commenced on the note on February 21, 1880, and in the complaint the several payments indorsed on the note were set out, and judgment was demanded for the balance after deducting said payments, together with the interest on such balance. Pending the action the said E. F. Hei died testate, and the same has been regularly continued against his executors.

The defense relied upon by the sureties was the statute of limitations, and the only question raised by the appeal is whether the payments made by the principal debtor, before the statutory period as to the note had expired, would take the case out of the statute as to the sureties. There is no doubt that at one time the courts of this State held that a payment made by one of several joint makers of a note, whether before or after the statutory period had expired, would take the case out of the statute as to others. *Beitz v. Fuller*, 1 McCord, 541, following the famous case of *Whitcomb v. Whiting*, Doug. 629; 1 Sm. Lead. Cas. 318. Subsequently however this doctrine was modified, so that while payment made by one of several joint contractors before the statutory period had run out might have the effect of taking the case out of the statute as to the others, yet that a payment made after the expiration of the statutory period would have no such effect. *Steele v. Jennings*, 1 McMull, 297; *Goudy v. Gillam*, 6 Rich. 29; *Smith v. Caldwell*, 15 Rich. 365.

Again it is manifest that in the earlier decisions the statute of limitations was, in disregard of the terms of the statute, regarded as raising a presumption of payment, and therefore any thing that went to rebut such a presumption was regarded as sufficient to take a case out of the statute. *Aiken v. Benton*, 2 Brev. 330; *Pearce v. Zimmerman*, Harp. 305; *Beitz v. Fuller*, *supra*, and other cases of that class. But the later decisions, giving effect to the express language of the statute, which declared that the action shall be commenced within the time limited, "and not after," treat the statute as an absolute bar to the recovery of the debt, unaffected by any presumption that the debt was actually paid. *Reigne v. Desportes*, Dudley, 118; *Smith v. Caldwell*, *supra*. From this it

logically followed that when the statutory period from the maturity of a note has run out before any action is commenced upon it, and reliance is placed upon a subsequent promise, whether express or implied, the action must be upon such promise, whether it is made before or after the expiration of the statutory period, and not upon the note.

As is said by O'NEALL, J., in *Reigne v. Desportes*, at page 124: "The statute directs that the action of debt on simple contract and assumpsit shall be brought within four years next after the cause of said action or suit, and not after; the words of the statute are of plain and obvious meaning, and to give it effect only two questions need be asked: When did the cause of action accrue? Is the suit brought within four years from the accrual of the cause of action? * * * If more than four years intervenes between the time at which the party by his contract had the right to demand the payment and institution of the suit, the bar of the statute is complete and effectual, and the cause of action is gone. But the old debt, as a past consideration, will support a new promise, for notwithstanding it cannot be legally enforced as a cause of action, yet if it has not been paid, the party who contracted it is in honesty * * * bound to pay it. This obligation of honesty and morality is a good consideration, and the new promise founded upon it will be enforced; but it is a new cause of action, not as the revival of the old one, for if not regarded as a new cause of action, the words of the statute would prevent it from enabling the party to recover. Regard it as a new contract, a new cause of action, and the case is not affected by either the intent or the words of the statute." He then goes on to show that a contrary impression had grown up, from the fact that under the old form of pleading in assumpsit, a new promise could be treated as the real cause of action under the general counts in the declaration, and from "many loose expressions * * * to be found in the opinions of some of the most learned judges."

So in *Smith v. Caldwell*, *supra*, WARDLAW, J., in laying down certain propositions which are held to be settled, uses this language: "1. That the statute of limitations does not operate by raising a presumption of payment, but by creating a legal bar to the action. * * * 2. That where the statutory period, counting from the original accrual of the cause of action, expired before commencement of the suit, a promise shown for the purpose of

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opposing the plea of the statute, is itself the true cause of action; and this, whether such promise was made before or after the expiration of the period just mentioned. If before, the legal liability was its consideration; if after, the moral obligation. This proposition, under the general form of pleading which is allowed, is, in practice, unimportant, where the declaration is in assumpsit upon an executed consideration; but it is material in the declaration of the rights of parties wherever the new promise, and that alone, stands unaffected by the statute; and from this proposition it follows that payment, admission, and the like are but evidence of a promise to pay; and that whatever is said to revive a debt must operate through a promise expressed or implied."

It will be observed that these principles, announced by these two distinguished judges in the cases last cited, are deduced from the terms of the former statute of limitations, which required actions to be commenced within the time limited, and not after; but we think that the language of the present statute — "civil actions can only be commenced within the periods prescribed in this title" — is equally imperative, and requires the same construction. It follows therefore that this action, not having been commenced within six years from the maturity of the note, cannot be maintained on the note, and the only question, assuming the action to be upon the subsequent promise implied by the payments, about which no question seems to have been raised, is as to whether the appellants are bound by such promise.

If this question be considered apart from authority, we do not see how there could be a doubt about it. If it be true, as we have shown it to be, that the legal liability of all the parties on the note is forever discharged by reason of the failure of the plaintiff to bring her action within six years from the maturity of the note, and that the plaintiff's only cause of action is the subsequent promise implied by the partial payments made by the principal debtor, P. W. Kraft, and credited on the note, then nothing would seem to be clearer than that no one is bound by such promise except the person who made it. If the subsequent promise, as we have seen, constitutes a new contract and a new cause of action, then certainly no one can be held liable to the performance of such new contract, except him who made it.

This is, and must necessarily be, conceded, but it is said that the act of one of several joint debtors, especially the act of making a

payment on the note upon which they are all liable, is the act of all, as it inures to the benefit of all, and that the relation of agency exists between them, arising from community of interest. We are however unable to discover any just foundation in the nature of things for such an idea. Their community of interest is confined to the payment of the debt, and cannot be extended beyond that. There is certainly no reason why a payment by one of several joint contractors, which inures to the benefit of all, should carry with it the idea that the one who makes the payment has the authority to make a new contract for all. An agency to pay; implied from the common obligation, does not necessarily, or even naturally, involve the idea of an agency to make a new promise whereby the common obligation is continued for a longer period than that fixed by the original contract, in which all the parties joined. For that would practically amount to an alteration of the original contract by extending its legal effect beyond the time when its legal obligation would cease. And when we remember the well settled rule that any alteration of the original contract by the creditor and principal debtor, without the assent of the surety, will discharge the surety, it would seem to follow necessarily that a payment made by the principal debtor, even before the statutory period has expired, cannot have the effect of continuing the legal obligation of the original contract beyond the period originally fixed for its duration, because that would be an alteration of one of the terms of the original contract.

A surety, when he signs a joint and several note with his principal, knows that unless the creditor brings his action on the note within six years from its maturity, his legal liability is discharged by the operation of the statute of limitations; and we are unable to see by what authority his liability can be extended beyond that period without his assent. One may be willing to assume a legal liability for another for a definite period, but it does not by any means follow that he would be willing to assume such liability for an indefinite period, dependent wholly upon the act of the other, to which he has not assented, and of which oftentimes he has no knowledge. So that it seems to us that it would be in violation of well settled principles to hold that a principal debtor can, by any promise of his own, either express or implied, without the assent of his surety, extend the legal obligation of such surety beyond the period originally fixed for its duration.

This notion that one of several joint debtors may, by his own act, without the consent of the others, defeat the operation of the statute of limitations upon the original contract, manifestly rests upon what is now conceded, and we believe universally conceded, to be an erroneous view of the statute; and is wholly inconsistent with the later and more correct view of the statute. As long as it was held that the statute operated "by raising a presumption of payment," and not "by creating a legal bar to the action," it was very natural that any thing which went to rebut that presumption should affect all the parties to the contract alike, and hence any act of any one of those parties tending to show that the debt was not in fact paid, was held sufficient to defeat the plea of the statute, which was then, in effect, a plea of payment, inasmuch as it was assumed that motives of self-interest would deter every one of the parties to the contract from any act or omission which would show that the debt was not paid, if in fact it was paid.

Accordingly we find that originally no distinction was drawn between mere admissions and positive promises, and no distinction was drawn between promises, either express or implied, made before or after the expiration of the statutory period on the original contract. In fact, the whole question was regarded as one of payment, and therefore any thing which went to defeat the presumption of payment arising from the lapse of the time fixed by the statute, was considered sufficient to defeat the plea of the statute. But when the later and more correct view of the statute became well settled—when it was definitely determined that the statute did not operate "by raising a presumption of payment," but "by creating a legal bar to the action;" and when it was distinctly decided "that where the statutory period, counting from the original accrual of the cause of action, expired before commencement of the suit, a promise shown for the purpose of opposing the plea of the statute is itself the true cause of action; and this, whether such promise was made before or after the expiration of the period just mentioned," a different rule must necessarily be adopted; otherwise the anomalous result would follow that a man might be made liable upon a contract which he never made or authorized, and which in many, if not most, cases he knew nothing of. If, after the expiration of the statutory period, from the maturity of the note the statute is a legal bar to an action on the note, and resort must be had to a subsequent promise, either express or

implied, as a new cause of action, it follows necessarily that no recovery can be had on such new cause of action against those who did not join in the subsequent promise which gave rise to such cause of action.

It is true that the conclusion at which we have arrived is in conflict with the decision in the case of *Silman v. Silman*, 2 Hill (S. C.), 416; but it will be observed that in that case Judge O'NEALL says that "the decisions that the promise of one joint contractor would take out of the statute a debt which would be otherwise barred, have been altogether founded in mistake," and in deciding otherwise only yields to what he calls "the unbroken current of authorities," and yet he modifies those former decisions by drawing a distinction, which had first been clearly pointed out in *Young v. Monpoey*, 2 Bail. 278, between a promise made before and one made after the expiration of the statutory period on the original contract, and confines the decisions to cases in which the new promise was made before the expiration of the statutory period, for the reason that in such a case the new promise operates as a continuance of the original liability for four years from the date of such promise; but that where the new promise is made after the expiration of the statutory period, "the debt is gone, and the new promise or acknowledgment must show a sufficient cause of action to entitle the plaintiff to recover," meaning, doubtless, that the legal remedy for the collection of the debt is gone, and the action can only be maintained on the subsequent promise as a new cause of action.

Thus stood the law when the case of *Smith v. Caldwell*, *supra*, came before the late Court of Appeals for decision, when we think the foundation upon which *Silman v. Silman* rested was swept away, and the case was practically overruled. This was the manifest view of the Circuit judge, and at least one of the judges of the Court of Appeals, and what was the opinion of the other two does not very clearly appear; for according to the view which they took it was not necessary either to affirm or disaffirm the case of *Silman v. Silman*, but the principles or propositions which they declared settled are clearly inconsistent with the ground upon which Judge O'NEALL placed the case of *Silman v. Silman*. For as we have seen, Judge O'NEALL, drawing a distinction between a promise made before and one made after the expiration of the statutory period on the original contract, based his decision upon the idea that where the prom-

ise was made before the expiration of the original statutory period, it operated as a continuance of the then existing liability for another period of four years from the date of such promise; but this idea is clearly repudiated in the case of *Smith v. Caldwell*, and is entirely inconsistent with the conclusion there reached.

In that case, before the statutory period on the note had expired, Neuffer, the principal debtor, made one payment, and within four years after such payment he made another payment, but the first was more than four years before the commencement of the action; and the second more than four years from the maturity of the note, but deducting the time during which the statute of limitations was suspended by one of the sections of the stay-law, within four years from the commencement of the action; and yet the court held that the action against Caldwell, the surety, was barred. Now it is manifest that if the court had recognized the doctrine upon which *Silman v. Silman* was based, to-wit, that the first payment operated as a continuance of the then existing liability of both parties for another period of four years from the date of such payment, the statute could not have been successfully pleaded, for during the second period of four years, over which, according to *Silman v. Silman*, the defendant's original liability had been extended, another payment was made, which upon the same principle, ought to have extended his liability for another period of four years, within which the action was commenced. It is clear therefore that the decision in *Smith v. Caldwell* is entirely inconsistent with the principle upon which the case of *Silman v. Silman* was decided, and that it was practically overruled by that case, though the majority of the court did not deem it necessary so to declare in express terms, and we are not aware of any case in which it has been subsequently recognized.

Under this view the other question as to the effect of the provisions of the Code of Procedure cannot arise, and need not be considered.

The judgment of this court is, that the judgment of the Circuit Court against Anna C. Kraft and the executors of E. F. Hei be reversed, and that the case, as to them, be remanded to that court for a new trial.

Reversed and remanded.

SIMPSON, O. J., concurred; MCGOWAN, J., dissented.

WALTER VERMILION

NOTE BY THE EDITOR.—To the same effect, *Pet. Sec. v. Butterworth*, 13 N. E. L. 244, 80 L. 150; *Am. Rep. 407*. "A payment upon a promissory note by one of the joint and several makers, and indorsed upon it before the note is barred by the statute of limitations, and within six years before suit brought, will not prevent the running of the statute as to the others. No such authority or agency exists or can be implied, from the joint contract as will authorize one to act for and bind the others so as to renew or extend their liability, where the relation is merely that of joint debtors. Neither is the agent of the other to make a new contract with the creditor, quite bind the others by a new promise changing or affecting their legal rights, or giving such creditor a right of action against them which he would not otherwise have. And nothing can be added to the exhaustive and satisfactory discussion of the subject in *Bell v. Morrison*, 1 Pet. 371, and *Van Keuren v. Parmelee*, 3 N. Y. 523; 8 C., 51 Am. Dec. 331, and notes; *Salemaker v. Benedict*, 11 N. Y. 184; 6 C., 63 Am. Dec. 191; *Whitcomb v. Wadsworth*, 3 Doug. 602, disapproved. In this country, in some of the States the rule has been changed by legislation; in others the doctrine is adhered to on the principle of *stare decisis*; while in a number of others the question has been re-examined, and the authority of that case repudiated; and it is safe to say that the general tendency and current of the decisions are against it. In *Story Par. v. § 324*, the learned author sanctions this statement as to the state of the decisions, and adds: 'In truth the whole controversy must ultimately turn upon the single point whether the acknowledgment is a mere continuation of the original promise, or whether it is a new contract or promise springing out of and supported by the original consideration.' Ang. Lim. 360, note 5; Wood Lim. 611 *et seq.*; 3 Par. Conf. *90; *Bois v. Fuller*, 10 Am. Dec. 693, note; 1 Smith Lead. Cas. (8th ed.), pt. 2, 1020-1022; *Winchell v. Hicks*, 18 N. Y. 560; *Wallis v. Randall*, 81 N. Y. 170; *Littlefield v. Littlefield*, 91 N. Y. 203; *Levy v. Cadet*, 17 Serg. & R. 126; *Bush v. Stowell*, 71 Penn. St. 203; *Kallenbach v. Dickinson*, 100 Ill. 297, 41; and cases; *Campbell v. Brown*, 88 N. C. 390; *Müller v. Müller*, 46 Am. Rep. 738." Minnesota Sup. Ct., March 9, 1893. *Willemsby v. Irish*.

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CASES

SUPREME COURT OF ERRORS

CONNECTICUT.

PRASE V. COLLE

(53 Conn. 53.)

Partnership—non-trading—power to bind firm—burden of proof.

One member of a partnership formed for conducting a theatre has no implied power to bind his partner by a note in the firm name, in the absence of necessity, usage, or ratification; and the burden of proof is on the holder.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

G. G. Still and H. S. Sanford, for appellant.

L. B. Stanton and S. F. Jones, for appellee.

LOOMIS, J. The question involved in this case is, whether one member of a copartnership, formed for the purpose of conducting a theatre in Hartford, could under the circumstances mentioned in the finding, bind the other member by executing a negotiable promissory note in the name of the firm for money borrowed.

The finding in terms excludes all express authority of the other partner, and even all knowledge of the matter on his part. So that any conclusion that the note is the note of the firm, rather than of

*To same effect, *Levi v. Latham* (15 Neb. 209), 42 Am. Rep. 361.

the member executing it, must necessarily rest on the authority to be implied. But here again the facts found so circumscribe the range of inquiry as to exclude all the ordinary sources of such authority.

The circumstances from which an authority may be implied are identical with those involved in a question of ordinary agency, for each partner is regarded as the accredited agent of the rest.

In many cases the decisive fact is found in the customary course of dealing, but not so here, for it is found that the note in question was the only note ever given in the name of the firm. The copartnership first commenced business in August, 1883, and on the twenty-fourth of the same month the note in suit was given. There was therefore very little time for a course of conduct or usage of any sort to grow up, giving any apparent authority.

The finding traces the money borrowed only into the hands of McCarty, the partner who signed the firm name, and no fact appears showing directly or presumptively that the act was necessary for any of the purposes of the partnership.

The only remaining source from which an authority may be derived by implication must be sought in the nature and scope of the partnership and in the nature of the act. And here, if we examine the legal principles that are applicable, it will be found not only that all such implication is wanting, but that the presumption is directly against the authority assumed. The weight of authority in the United States and the uniform tenor of the authorities in England will be found to establish a controlling distinction in respect to implied authority between commercial or trading and non-trading partnerships. Story Part. (6th ed.), § 102, *a*; 1 Lindley Part. (4th ed. by Ewell), top page 266 and note 1 and cases there cited; 1 Collyer Part. 648, 658; Metc. Cont. 121, and cases cited in the notes.

In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business, and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions.

But when we pass to non-trading partnerships the doctrine of general agency does not apply, and there is no presumption of

authority to support the act of one partner. Hence in order to subject the firm upon a bill or note executed by one partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his copartners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it.

That the partnership in question belongs to the non-trading class seems so obvious as to need no discussion. The brief in behalf of the defendant Cole cites many cases, and gives a long list of pursuits and professions which those cases establish as of the non-trading class, and although the conduct of a theatre is not there mentioned yet the analogies manifestly include it.

To show the existence of the distinction contended for and its application, we select from a multitude of authorities the following in addition to those previously referred to.

In *Judge v. Brasswell*, 13 Bush, 67; s. c., 26 Am. Rep. 185, the defendants were partners under an agreement to engage in mining business upon lands then leased or which might be thereafter acquired. One of the members of the firm purchased, without the other's consent, and took conveyances of mining land in the name of the firm, and gave the bills of the firm therefor. In an action by the payee of the bills against the firm, a defense was made by the other partners that the purchase was without their consent or ratification, and in the plea they renounced all claim to the lands purchased. The court held that the firm was not liable on the bills; saying that the power of one partner to bind his copartners rests alone on the usage of merchants, and does not amount to a rule of law in any other than commercial partnerships. In non-commercial partnerships one who seeks to hold the firm bound upon a contract made by a single member must be able to show either express authority or that such is the customary usage of the particular branch of business in which the firm is engaged, or such facts as will warrant the conclusion that the partner had been invested by his copartners with the requisite authority.

In *Hedley v. Bainbridge*, 3 Q. B. 316, the defendants were attorneys in partnership, and one of the partners gave a note in the name of the firm to the plaintiffs for the balance of advancements made to one partner who was acting in behalf of the firm; the advances were to be laid out on mortgage by the firm. Lord DENMAN, C. J., in giving the opinion said: "No doubt a debt was due from

the firm; but it does not follow that one party had authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business. * * * Upon the whole we think that the implied authority is confined to partners in trade."

In *Dickinson v. Valpy*, 10 Barn. & Cress. 128, the plaintiff was an indorsee for value of a bill of exchange drawn and accepted in the name of a mining partnership by order of its regular directors. It was held incumbent on the plaintiff to prove that the directors had authority to bind the company, and that it was necessary for the purpose of carrying on the business of the company or usual for other similar mining companies to draw or accept bills of exchange. Opinions were given by Lord TENTERDEN, C. J., and Judges BAILEY, LITTLEDALE and PARKE, and the same distinction was made as in other cases between trading and non-trading partnerships. See also *Greenlade v. Dower*, 7 Barn. & Cress. 635.

In *Levy v. Pyne*, tried before Baron ALDERSON, 1 Car. & Marsh. 453, it was held that "if a bill of exchange or promissory note be drawn, accepted or indorsed by one of two persons who are partners in a business which is not a trade (*e. g.*, as attorneys), in the name of the firm, * * * the plaintiff must give evidence of the authority of the other partner to draw, accept or indorse in the name of the firm; but in the case of a commercial firm this is not necessary, as there is a general authority." See also *Richards v. Bennett*, 1 Barn. & Cress. 223; *Garland v. Jacomb*, L. R., 8 Exch. 218.

In *Smith v. Sloan*, 37 Wis. 285; s. c., 19 Am. Rep. 757, the court, by LYON, J., after an able and exhaustive review of the authorities, adopted the following proposition as fully sustained: "We gather from all the authorities that the distinction between a trading and non-trading partnership, in respect to the power of a partner to bind his copartner by negotiable instruments, is not limited to a mere presumption of such authority in one case and the absence of such presumption in the other, as the learned coun-

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ael for the plaintiff argued; but we think and must so hold, that one partner in a non-trading partnership cannot bind his copartner by bill or note, drawn, accepted or indorsed by him in the name of the firm, not even for a debt which the firm owes, unless he have express authority therefor from his copartner, or unless the giving of such instruments is necessary to the carrying on of the firm business, or is usual in similar partnerships; and the burden is upon the holder of the note, who sues upon it, to prove such authority, necessity or usage.

In *Ulery v. Ginrich*, 57 Ill. 531, the partnership was for farming purposes, and the note in suit was given by one in the name of the firm for money borrowed. It was held to be a non-trading firm, and the same principles were adopted as in the cases previously cited. In *Hunt v. Chapin*, 6 Lans. 139, it was held, MILLER, P. J., giving the opinion, that the rule which authorizes one member of a copartnership to bind the firm is only applicable to business of a trading nature, and has no application to partnerships for agricultural purposes or others of a similar character. See also *Kimbrow v. Ballett*, 22 How. 256; *Graves v. Kellenberger*, 51 Ind. 66; *Third National Bank v. Snyder*, 10 Mo. App. 211.

In Chalmer's "Digest of the Law of Bills of Exchange, Promissory Notes and Cheques," second edition, pages 68 and 69, the following propositions are laid down as well settled rules: "Art. 77. A partner in a trading firm has *prima facie* authority to bind the firm by drawing, indorsing or accepting bills in the firm name for partnership purposes; and if the bill gets into the hands of a holder for value without notice, the presumption of authority becomes absolute, and it is immaterial whether it were given for partnership purposes or not." "Art. 78. A partner in a non-trading partnership has *prima facie* no authority to render his copartners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible."

Many more authorities equally pertinent might be cited, but these will suffice to show that the distinction relied upon is strongly supported both in England and in the United States. While we feel constrained to adopt the distinction between the two classes of partnership so far as the presumption of authority or the want of it is concerned, we do not deem it necessary for the purposes of this case, or even quite reasonable, to carry its application so far as to deny absolutely, as some of the cases do, the right to recover on

a note given by a non-trading firm for money borrowed for the firm and appropriated to its use, or on a note given in payment of its debts.

Some authorities ignore the test of liability referred to, but adopt another which is equivalent in result. Chancellor Kent, in his chapter on partnerships in the third volume of his Commentaries (7th ed.), p. 44, omits the use of the terms "trading" and "non-trading," and makes the distinction between partnerships in respect to the power of one partner to bind the firm depend on the single test of the usual scope of the business in connection with the subject matter of the contract.

This rule was adopted in *Crosthwaite v. Ross*, 1 Humph. 23; s. c., 34 Am. Dec. 613, where it was held that one partner in the practice of medicine could not bind the firm by drawing a bill or note on which to raise money, because it was not within the scope of the partnership business. Though under a different name the real distinction here taken is between partners in trade and partners in an occupation.

Afterward the same court, in the case of *Pooley v. Whitmore*, 10 Heisk. 629; s. c., 27 Am. Rep. 783, in a most able and elaborate opinion held that the liability of a partnership firm of the non-trading class to a *bona fide* holder of negotiable paper without notice, upon a note indorsed in its name by a member for his own benefit, would depend upon the nature of the business, the usage of trade and the course of dealing of the particular firm. It was also held that where the nature of the partnership is such that it may or may not be proper to deal in negotiable instruments (as in that case which was a publishing company), it was error in the Circuit judge to charge without qualification that the firm was liable if the holder received the note before maturity in the due course of trade and without notice. We think the same principle under the circumstances of the case at bar made it error in the court below to hold the firm liable.

This court hitherto has had no occasion to give prominence to the distinction under discussion. The nature of the partnership business has however been made a ground for a presumption and a test of liability. In *Walcott v. Canfield*, 3 Conn. 194, the defendants were partners in running a line of stages from Hartford to Albany and back. One of the partners by an advertisement promised to transport passengers and leave them at Albany in a speci-

fied time, upon which agreement the suit was based. The advertisement, being the act of one partner, was held not even admissible in evidence against the firm without previously establishing the authority of that one to bind the others. Hosmer, C. J., in delivering the opinion on page 198 said: "A copartnership formed to transport passengers and their baggage in a stage, does not authorize one of the partners to bind the firm by an agreement that he will convey a person a certain distance within a specified time. Unless he had special authority he could only obligate himself by a contract not within the scope of the connection, and not his partners, who had never expressly or impliedly assented." The subject matter of the contract was different from the case at bar, but it seems even more closely connected with the scope of the business than the giving of the note in suit.

Many authorities lay down the unqualified proposition as if it was applicable to all partnerships, that if one partner raises money on a negotiable bill or note signed or indorsed in the name of the firm and which comes into the hands of a *bona fide* purchaser, the partnership is bound, although it was in fact for the individual use of the acting partner. The doctrine is so stated in substance by this court in *New York Fire Ins. Co. v. Bennett*, 5 Conn. 574; s. c., 13 Am. Dec. 109. The case shows that the partnership was a commercial one. We do not say however that public convenience does not demand the same rule in the case of non-commercial partnerships, where the holder was not advised of the nature of the partnership and its course of dealing or of other circumstances to put him on inquiry, and where the circumstances would justify the belief that he was dealing with the partnership. We may well leave this for future consideration, for upon the facts found we think the plaintiff's right was impaired by reason of what he knew in connection with the circumstances. We do not forget that the court below in terms found that the plaintiff purchased the note in good faith without notice of any defect. This of course means simply that there was no actual bad faith and no actual notice, and as matter of fact it is final, but at the same time the court found special facts as to the plaintiff's knowledge and action which we must also consider, and if we find constructive notice or constructive fraud the law must prevail.

The plaintiff as holder must stand affected by the nature of the partnership, of which he was fully advised. He purchased the

note in the face of the presumption that it was unauthorized. To show the general nature of the facts which courts have held to be constructive notice, we cite a few cases.

In *Livingston v. Roosevelt*, 4 Johns. 278; s. c., 4 Am. Dec. 273, A. and B. formed a copartnership under the style of A. & Co. in the business of sugar-refining, and so advertised in the newspapers. B. afterward, without the knowledge of A., bought a quantity of brandy, for which he gave a note indorsed by him with the name of the firm. The plaintiff, who was an indorsee of the note, took the newspapers in which the firm's business was advertised. KENT, C. J., after commenting on certain facts tending to show that the plaintiff knew that the purchase of the brandy was not a partnership concern, proceeded to lay down these principles:—"But if the plaintiff did not in fact know that the purchase was made by C. I. Roosevelt on his own account and acted under the mistaken impression that it was a partnership purchase, still the firm were not bound by the indorsement, because the facts disclosed amounted to constructive notice or notice in law.* * * When a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of the law will be that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be circumstances to destroy that presumption. 'If,' says Lord ELDON (8 Vesey, 544), 'under the circumstances the person taking the paper can be considered as being advertised that it was not intended to be a partnership proceeding, the partnership is not bound.' Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting house, the sign, etc., are the usual and regular indicia by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any other than a partnership account. * * * When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals."

In 1 Collyer Part. 650, it is said that "a note given by one partner in the partnership name, within the scope of the partnership,

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is binding upon the firm, but the payee is bound to know whether it is within the scope of his apparent authority, and if it is in excess thereof the firm is not responsible."

In *Cocks v. Branch Bank of Mobile*, 3 Ala. 175, the note in suit was signed in the partnership name of J. F. & W. Cocks, who were partners in keeping a tavern. It was executed by J. F. Cocks, and payable to Lee & Langdon for their accommodation, without the knowledge of the other partner, Woodson Cocks. No actual knowledge of the circumstances was shown on the part of the bank, which sued as indorsee, but it was assumed to have been the duty of the bank to make inquiry. GOLDTHWAITE, J., in delivering the opinion said (p. 180): "The law presumes that the bank, if it inquired at all into the partnership of the defendants, must have received information that they were not partners in a mercantile trade, but only in the business of tavern keeping. This ascertained, it took the note at its peril, and must have relied on the faith of the indorsers." It was held that Woodson Cocks, the partner who had no knowledge of the transaction, was not liable.

In the case at bar the plaintiff had full and actual knowledge of the nature of the partnership, and the law attributed to him knowledge also that one partner could not bind the other by bill or note without authority, and knowing as he did that the note had been written and signed by McCarthy, who was irresponsible, and that if he purchased it it would be upon the credit of Cole alone, and having also actual knowledge of a course of dealing which avoided McCarthy and pointed to Cole alone as the financial representative of the firm; it seems to us that the plaintiff took the note at his peril. It was very strange for the plaintiff to inquire of the one who had used the firm name if it was the note of the firm, and omit entirely, when he had ample and easy opportunity, to inquire of the other party on whose sole credit he depended; but the court has found that the failure to inquire of Cole was not owing to a belief that inquiry would result in finding the note invalid, and this we must accept as true. Ordinarily such a finding would save the rights of a holder in good faith of negotiable paper, but the great difficulty in the present case is, that the note was purchased with constructive notice that it was not within the apparent scope of the partnership business and *prima facie* was not the note of the firm; and the actual course of business, so far as it was known to the plaintiff, tended to increase rather than allay the suspicion of a want of authority.

But the plaintiff contends that the judgment in his favor cannot be disturbed because the burden of proof was on the defendant. On this general subject of the burden of proof most of the authorities cited in another connection to show the distinction between the two classes of partnerships, and many others that we might cite, assert most positively that in the case of non-commercial partnerships the burden is on the holder of the note. But we concede that many cases can be found which in terms would seem to place the burden on the defendant.

In some of these cases the partnerships were in fact commercial, as in the case of *Faler v. Jordan*, 44 Miss. 283. In *Doty v. Bates*, 11 John. 544, PLATT, J., giving the opinion, said: "The partnership being admitted, the presumption of law is that a note made by one partner in the name of the firm was given in the regular course of partnership dealings, until the contrary is shown on the part of the defendants." The case is so brief in the report that we cannot see clearly what was involved in the admission of the partnership which furnished the basis for the presumption. It incidentally appears in the description of the firm that its business was tanning, currying and shoemaking. This doubtless involved the buying of hides, bark and materials for tanning, and the sale of leather and shoes. The basis of the presumption was doubtless the apparent scope of the business.

In *Holmes v. Porter*, 39 Me. 157, the head-note omits an important qualification. The proposition laid down by the court is, that "when the contract is made in the name of the firm it will *prima facie* bind the firm, unless it is *ultra* to the business of the firm." The head-note omits the last clause.

The case of *Carrier v. Cameron*, 31 Mich. 373; s. c., 18 Am. Rep. 192, was relied upon by the plaintiff to show that the burden was on the defendant. In terms it so holds, but a brief analysis will show that it is not inconsistent with our position in this case, and will suggest a mode of reconciling many apparently conflicting cases. There was nothing at all in the case to show the nature of the partnership and the plaintiff's knowledge of it. GRAVES, C. J., in giving the opinion stated the question as follows: "Was the plaintiff below required, in order to make out a *prima facie* case, to show at the outset that Carrier had express authority to make notes generally, or else to show either that the copartnership was one of the class in respect to which such authority is presumed, or

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that its course of business had been such as to imply authority, or that the signing by Carrier had been approved or ratified? The question was answered in the negative upon the authority of *Littell v. Fitch*, 11 Mich. 525.

It is to be noticed that the question was simply as to the burden of proof after the fact of partnership was admitted and before the nature or class of the partnership appeared. That being the position of the case the court well remarked that "it was not needful for the plaintiff by any positive averment or positive proof to negative a defense which in virtue of a general presumption would be intended not to exist. He could not be required to go into particular proof on such a point until some proof should appear in contravention of the presumption." In this statement of the law we fully concur, but it is not applicable to the facts in the case at bar, because the controlling fact in the proposition is wanting; proof in contravention of the presumption which in the outset was in favor of the plaintiff had appeared and had resulted in the finding of the opposing facts; and it is significant that all the facts which the above question impliedly concedes to be sufficient to overcome the presumption referred to are distinctly found, namely, that there was no express authority to make notes generally or to give this note; that the partnership was of the non-trading class in respect to which no authority can be implied; that there was no course of business that could imply authority; and that the giving of this note had never been ratified or approved by Cole. Whatever presumption therefore there might have been in favor of the plaintiff at the outset had been fully overcome, and if there exists any further fact from which an authority might be implied, the plaintiff must show it or lose his case.

It is manifest that the Michigan case, as indeed all the cases treating of the burden of proof in suits on notes alleged to have been executed by partnerships, an illegitimate use has been made of the term "burden of proof." Properly it is applied only to a party affirming some fact essential to the support of his case. Thus used it never shifts from side to side during the trial. Loosely used, as in the cases referred to, it is confounded with the weight of evidence, a very different thing, which often shifts from one side to the other as facts and presumptions appear and are overcome, and in this indiscriminate use of the term "burden of proof," much of the apparent conflict in the cases has its origin. For after all the

test of the burden of proof is very simple, and so is the question of the weight of evidence, and there is no contrariety in the principle adopted by the authorities. In the light of principle we think it may be demonstrated that the position of the plaintiff is untenable. A partnership has been sued on a note executed in its name. Upon the trial the note is produced by the plaintiff and the first question is, was it the note of the firm? The plaintiff takes the affirmative of this issue, because if no evidence is offered on either side he must fail; he has then the burden of proof, and it remains on him and does not pass at all to the defendant. But suppose now it is shown or admitted that the partnership alleged exists, and that one of the firm executed and delivered the note in its name. By virtue of the general presumption that authority was given by the partnership, the plaintiff is entitled to recover, if nothing further appears, because the weight of evidence is on his side. But suppose the defendants take their turn, and prove the identical facts here found — that there was no authority general or special given — no ratification of the act — no course of dealing to imply authority; and furthermore that the partnership was of a class from which no authority can be implied. Is the plaintiff now entitled to a verdict? Has he proved that the note was the note of the firm? Surely not. What then is left on which to rest his case? The preponderance of evidence is not with him. The burden upon him to show that it was a partnership note has not now been met. But it is said that there is a realm of inquiry not touched by either party, that is, that it was not shown whether or not the partnership had the benefit of the consideration of the note. If such a fact appeared we concede for the purposes of this case that it would tend to show that the note was the note of the firm. But if an authority could not be implied as the case stood before, can it now be implied? The case stands precisely as before, there can be no change in the weight of the evidence because nothing has been added, and the claim of the plaintiff would seem to be reduced to the absurdity that he is to have the same benefit from an unproved fact as from one proved.

There was error in the judgment complained of, and as against the defendant Cole it is reversed and a new trial ordered.

In this opinion the other judges concurred; except GRANGER, J., who dissented.

Judgment reversed.

STATE V. BARBOUR.

(38 Conn. 73.)

Municipal corporation — appointment of officers by.

A city charter provided that the common council in joint convention should appoint a prosecuting attorney, but gave no direction as to the mode of appointment, and the convention had no power of removal. The convention met for the purpose of making the appointment, and voted "to proceed to ballot for a prosecuting attorney." A ballot was taken and the relator had a clear majority of all the votes cast and of the whole convention, and the result was announced by the presiding officer. A resolution declaring the relator elected was then proposed and lost. Two resolutions were then offered, one declaring the ballot taken void by reason of errors in it (which it was found did not exist), and the other declaring the defendant "elected and appointed prosecuting attorney;" both of which resolutions were passed. *Held*, that the relator was duly elected.

INFORMATION in the nature of *quo warranto*. The head-note states the facts. The plaintiff had judgment below.

C. E. Perkins and *O. J. Cole*, for appellant.

W. Hamersley, State's attorney, and *W. C. Case*, for appellee.

CARPENTER, J. The charter of the city of Hartford provides that the common counsel, in joint convention, shall provide a prosecuting attorney, but gives no direction as to the mode of appointment. The convention therefore is at liberty to proceed as it pleases, by ballot, by resolution, by the adoption of a verbal motion, or in any other manner. In this case a member moved that the convention proceed to ballot for a prosecuting attorney, and the motion prevailed. Thereupon a ballot was taken and the relator had a clear majority of all the votes cast, and of the whole convention. After the result was announced another member of the convention offered a resolution declaring the relator elected. That resolution, on a yea and nay vote, was lost. Two resolutions were then offered; the first declaring the ballot just taken null and of no effect by reason of errors in the same, and the other declaring that Joseph L. Barbour "is hereby elected and appointed prosecuting attorney, etc." These resolutions were passed.

The question is which of the two candidates was appointed. The

Superior Court held that the relator was appointed, and the defendant appealed to this court.

It will be observed that the business of the convention was limited to making appointments. For all the purposes of this case we may assume that its sole business was to appoint a prosecuting attorney, and that it had no other powers or duties. It had but one thing to do, and when that was done, its powers were exhausted. Unlike legislative bodies convened for purposes of ordinary legislation, it had no power to enact and repeal, and its power to reconsider was very limited, being confined to the preliminary proceedings. The term of office is prescribed by the charter — “for the term of one year, and until his successor is chosen and qualified.” The power of removal is not vested in the convention. It follows that when the appointment is once made the title to the office vested in the appointee, and it was not in the power of the convention to take it from him.

The question then is reduced to this — was the relator appointed by the ballot? In behalf of the defendant it is contended that he was not; that the ballot should be regarded as an informal one; that the convention, as appears by its subsequent action, manifestly contemplated and intended that the passage of a resolution declaring the candidate receiving the majority of votes elected should be the act of appointment; and that until that is done, even until the convention has adjourned, the proceedings are *in fieri*, and it cannot be said that an appointment has been made.

In behalf of the relator it is contended that the vote of the convention to proceed to ballot for a prosecuting attorney was equivalent to, and must be regarded as, a vote to elect or appoint a prosecuting attorney by ballot; that when the result was announced the appointment was complete, nothing more being required; that the relator thereby acquired a vested right to the office, and that it was not in the power of the convention by its subsequent proceedings to deprive him of it.

We are inclined to think that the view presented by the counsel for the relator is the better one. If the convention had adjourned immediately after the result of the ballot was announced, we think it must be conceded that Mr. Coogan would have been legally appointed. The adjournment would have indicated that the convention regarded its duty as fully performed. But the convention proceeded to consider and vote upon resolutions declaring the respect-

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ive candidates elected. This proceeding may be accounted for on one of two grounds; first, the convention may not have regarded a resolution as essential to an appointment, but simply as a more formal and orderly declaration of the result. Secondly, that the convention considered the resolution as necessary to an appointment. In the former case it is evident that the resolution would not give efficacy to the ballot nor add to its force and effect. In the latter it is equally apparent that the views of the convention as to the necessity of a resolution would not be conclusive. So that the question remains, notwithstanding the subsequent action, was the result of the ballot a legal election? If that was its effect without the subsequent action, we think it must have the same force with it.

It was doubtless competent for the convention to have determined in advance that the appointment should be made by the passage of a resolution, that the ballot should be an informal one, or that it should be a method of selecting a candidate to be appointed by resolution. In such a case there would have been no appointment prior to the passage of the resolution. But such was not the action of the convention. The vote was, not to take an informal ballot, not to select by ballot a person to be appointed, but to ballot for a prosecuting attorney. The ballot, we think, was understood and intended to be an election; and an election was an appointment.

We interpret the vote to ballot as equivalent to a vote to elect or appoint by ballot — as a vote determining the method by which the appointment should be made. After the passage of that vote an appointment by any other method would not have been in order — would not have been according to parliamentary usage. If the convention had omitted the ballot, and made the appointment by resolution without first rescinding the vote to ballot, it might perhaps have been a legal appointment, on the ground that there was an implied rescission, but it certainly would have been irregular. But that course was not taken. After voting to ballot a ballot was actually taken which resulted in an election by a clear majority. Then, without any vote changing the method, the convention proceeded to pass a resolution which declared another man elected and appointed. In addition to the irregularity of not following the prescribed method, they departed from it after the thing to be done had been done. The convention decided to appoint and did appoint by ballot, and then appointed another man by resolution.

We have said that the appointment was made when the result of

the ballot was ascertained and declared. Nothing more was required of the convention. Its will had been expressed in a parliamentary and legal method, had been duly declared, and become a matter of record. Declaring the result by resolution was unnecessary. No certificate or commission from the convention or its officers was required by law. Mr. Coogan's right to the office vested at once, and he might without further ceremony accept and qualify.

We do not wish to be understood as denying the power of the convention to correct errors and to nullify the effects of fraud. If there was a palpable error or fraud, or if the ballot for any cause was illegal, the convention might undoubtedly treat it as void, and proceed to another election. If we were to look only to the resolutions which passed we might assume that there was an error in the ballot and so give effect to the resolution. But the pleadings show that it was admitted that there was in fact no error or mistake. The mere declaration that there was an error when there was none, and the attempt to nullify the appointment on that ground cannot be vindicated.

These views are believed to be in harmony with the best and most carefully considered cases. Appointments to office, by whomsoever made, are intrinsically executive acts. It has been so held when the appointment was made by a court. *Taylor v. Commonwealth*, 3 J. J. Marsh. 401. Also when made by the common council of a city. *Achley's case*, 4 Abb. Pr. 35. And when made by an executive officer. *Marbury v. Madison*, 1 Cranch, 137.

When the appointing officer or body has not the power of removal, if the power to appoint has been once exercised it is irrevocable, and the appointee will hold office during the term. *Marbury v. Madison*, *Achley's case*, *supra*; *Cole v. Chapman*, 44 Conn. 601; *Putnam v. Langly*, 133 Mass. 204.

An appointment is complete when the last act required of the appointing power has been performed. The signing of a commission by the president of the United States, when the appointment was made by him, and the law required a commission, was held to be the last act. *Marbury v. Madison*, *supra*. Also a writing signed by the mayor of a city making a nomination to be confirmed by the common council, under the erroneous belief that such confirmation was necessary, although it was not required by law. *People v. Fitzsimmons*, 68 N. Y. 514. In the case of a judicial ap-

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pointment a declaration in open court, when the law does not require the appointment to be in writing, has been held to be final. *Hoke v. Field*, 10 Bush, 144; s. c., 19 Am. Rep. 58. In *Achley's case*, *supra*, it was held that the appointment was made when both branches of the common council concurred in the passage of a resolution making the appointment. So also in *People v. Stowell*, 9 Abb. N. C. 456. In *Conger v. Gilmer*, 32 Cal. 75, the law required that justices of the peace appointed by the board of supervisors should receive a commission signed by the officers of the board and sealed with its seal; it was held that a commission so signed and sealed was the only evidence of an appointment. If however such formal act is to be performed by some other than the appointing power it constitutes no part of the appointment. *Marbury v. Madison*, *supra*; *People v. Stowell*, *supra*. Such formal acts in such cases are mere ministerial acts.

The case of *Marbury v. Madison*, *supra*, is worthy of a more extended notice. In that case nearly all the important principles involved in this were promulgated by the Supreme Court of the United States in an elaborate opinion by Chief Justice MARSHALL, in which the whole subject is exhaustively considered.

President Adams, under a law of Congress, nominated certain persons to be justices of the peace in the District of Columbia, and the nominations were confirmed by the senate. The law required that the appointees should be commissioned by the president under the great seal of the United States. The appointment was for a term of five years. The president signed the commission and the seal, under the statute, was affixed by the secretary of State, by whom alone it could be affixed. The commission however was not delivered. The persons appointed applied to the Supreme Court for a *mandamus* to compel its delivery. On a rule to show cause the court held that the appointment was complete, and that the persons therein named were legally entitled to the office; but discharged the rule on the ground that the cause was not within the jurisdiction of the court.

The opinion shows that in some cases there is a distinction between the acts of appointing to office and commissioning the person appointed. "It follows," say the court, "from the existence of this distinction, that if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer, and if he was not removable at

the will of the president, would either give him a right to his commission, or enable him to perform the duties without it." Again—"This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable, it being almost impossible to show an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment, though conclusive evidence of it."

It was then held that the appointment was made when the last act required of the president was performed. On this point the court says:—"Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself, still it would be made when the last act to be done by the president was performed, or at furthest, when the commission was complete. The last act to be done by the president is the signature of the commission. He has thus acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate, concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. Some point of time must be taken when the power of the executive over an officer, not removable at his will must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power has been performed."

The case then holds that affixing the seal to the commission was no part of the appointment, nor was it essential to its validity, it being a mere ministerial duty to be performed by a ministerial officer and not by the appointing power. "It is never to be affixed till the commission is signed, because the signature which gives force and effect to the commission is conclusive evidence that the appointment is made."

It is then held that the power having been exercised and the appointment made, the president could not unmake it and appoint another, notwithstanding the fact that the commission had not

been delivered; and for the reason that the president had not the power of removal. On this point the court say: "Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable; and the commission may be arrested if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment his power over the office is terminated in all cases where by law the officer is not removable by him."

The case of *Conger v. Gilmer*, 32 Cal. 75, is cited and relied on by the defendant. In that case it was decided that, "the appointment to office by the board of supervisors is not complete until the person appointed has received a certificate of his election under the seal of the board, signed by the proper officers of the board. An appointment made by a majority of the board may be revoked at any time before such certificate is issued and another person may be appointed. In the case of an election to office by the people the rule is different, and the issuance of a commission is a mere ministerial act." A statute of California required that the person appointed should receive a certificate of his appointment signed by the officers of the appointing body and sealed with its seal. The court following the case of *Marbury v. Madison*, held that the appointment was not complete until the last act required of the appointing power had been performed; and that the last act was the issuance of a certificate signed and sealed as required by law. A United States statute made the secretary of state the custodian of the great seal and made it his duty to affix it whenever required. When therefore it was affixed to commissions issued by the president to complete an appointment made by him it constituted no part of the act of appointing, but was a mere ministerial act attesting the verity of the presidential signature. In *Conger v. Gilmer* the signing and sealing of the certificate were acts to be performed by the board, the appointing power being performed by its officers and by its immediate direction, and were properly held to be an essential part of the act of appointment—executive and not ministerial acts. So far that case seems to be in harmony with the views we have expressed, and is an authority quite as much in favor

of the plaintiff as of the defendant; for in this case it will be remembered that no seal, no certificate, nor any act other than that actually performed, is required from the appointing power.

In that case it will be observed that the second appointment was made some days after the first and at a subsequent meeting. The board doubtless had continuing jurisdiction over the subject matter. But it is not contended, that when the law requires a convention to meet on a given day and make an appointment, the convention may meet on a subsequent day and revoke an appointment made at the time required.

The case of *Baker v. Cushman*, 127 Mass. 105, another case cited by the defense, was this: The aldermen and councilmen, thirty-one in number, met in joint convention to appoint a city clerk. Baker received seventeen votes, but there were thirty-two votes cast. The convention declared the ballot void, and on a second ballot being taken Cushman was elected. The court held that his election was legal, saying that "it was within the lawful power of the convention, at the same meeting, and before the result of the election had been declared, to treat the proceedings already had as irregular and invalid, and to vote anew." In that case there was a reason for setting aside the ballot. It may have been tainted with fraud: If fraudulent, the extent of the fraud could not be known, for several members entitled to vote may have refrained from voting, and several not entitled to vote may have voted; and possibly the fraudulent votes may have been required to make a majority. The convention had a right to insist, and it was due to the appointee, that there should be a ballot free from any suspicion of fraud. Had there been a similar fact in this case, or any reason for declaring the ballot void, it would have presented a different question. We regard that case as consistent with the position we have taken.

The case of *State v. Foster*, 2 Halsted (N. J.), 101, was, like this, the case of an appointment by a joint convention of two bodies. It consisted of fifty-six members, of which only fifty-five were present and voting. On two ballots Miller had twenty-eight votes, but was not declared elected, the chair ruling that a majority of the whole number was necessary, in which ruling he was sustained by the convention. Another ballot was taken and Foster received thirty-one votes and was declared elected. The court held that Foster was legally elected. The court interrupted the counsel for

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the plaintiff with the announcement that their minds were made up, and then said "that all deliberative assemblies during their session have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is done. In this case they had a right to reconsider any question which had been before them or any vote which they had made." We cannot regard that case as an authority controlling or materially influencing our decision, for several reasons. It was hastily decided and manifestly was not well considered. It confounds legislative proceedings with executive acts and applies the rules regulating the former to the latter, while such rules are applicable only to a limited extent. It assumes that the convention had power to undo as well as to do, to remove as well as to appoint. That may have been so in that case, while confessedly it is not so in this.

For these reasons a majority of the court holds that there is no error in the judgment of the Superior Court.

In this opinion LOOMIS and GRANGER, JJ., concurred; PARK, C. J., dissented.

BARTLETT V. SLATER.

(33 Conn. 102.)

Will — legacy — interest.

A legacy of a fund in trust to pay the income to the testator's granddaughter, the trustee's daughter, or such portion as he might consider best, and payable within one year from the testator's death at the convenience of the executor, does not draw interest until a year from the testator's death.

THE opinion states the case.

F. Bartlett, in person.

J. Halsey and *W. A. Briscoe*, for defendants.

PARK, C. J. The will of John F. Slater, bequeaths the sum of \$1,000,000 to his son-in-law, Francis Bartlett, the plaintiff in this suit, in trust to pay the income arising therefrom or such portion thereof as he, the trustee, might consider best, to the testator's granddaughter, the daughter of Mr. Bartlett, during her natural life.

In another clause of the will this bequest is made payable to the trustee, by the executors of the will, within one year after the death of the testator, at the convenience of the executors, and they are authorized to pay it in stocks or bonds belonging to the estate at their cash value, or in cash as might be preferred.

The sole question in the case is, whether the trustee is entitled to interest on this bequest from the death of the testator, or from the end of one year thereafter.

The general rule on the subject is thus stated in *Williams on Executors*: "When no time of payment of the legacy is fixed by the will, the executor is allowed one year from the death of testator to ascertain and settle his affairs; at the end of which time the court for the sake of general convenience, presumes the personal estate to have been reduced to possession. Upon that ground interest is payable from that time, unless some other period is fixed by the will. Nor will interest be payable from an earlier date though there is a direction in the will to pay the legacy as soon as possible." 2 *Williams Exrs.* 1424. See also 2 *Redfield Wills*, 465, 471; 1 *Swift Dig.* 455.

There are some exceptions to this general rule. One is where a legacy is given in satisfaction of debt. Another is where a legacy is given to the testator's minor child, or to one to whom the testator is *in loco parentis*, and there is no other provision for the maintenance of the legatee. Another is where the legacy is an annuity; and still another where the bequest is of the residue of the testator's estate, or of some aliquot part thereof, in trust to pay the interest or income to the legatee for life with remainder over at his death.

In all these cases the rule is to allow interest from the death of the testator. But no one of these exceptions to the general rule applies to the case under consideration. It is claimed however that the legacy being given to a third person to pay the income to the beneficiary during her natural life, is in the nature of an annuity, and that so the rule in relation to annuities should apply.

The language of the bequest is as follows: "To pay the income arising therefrom or such parts thereof as he (the trustee) may consider best, and at such times as he sees fit, to my granddaughter during her natural life." This bequest grants discretionary power to the trustee to pay to the beneficiary such portion of the income as he may consider best. He may pay over the whole, or any por-

tion thereof, or none at all, according to his discretion. The time of payment too is left wholly to the discretion of the trustee. The bequest has but few of the elements of an annuity, which is "a yearly payment of a certain sum of money granted to another in fee, or for life, or for a term of years, charging the person of the grantor only." 2 Williams Exrs. 809.

In the case of *Booth v. Ammerman*, 4 Brad. 129, the court says: "The income or interest of a certain fund is not an equity, but simply profits to be earned, and although directed to be paid annually, that relates only to the mode of payment, and does not change the character of the bequest. In such a case it does not become the duty of the executor to invest the principal fund until the end of a year, and the interest does not become payable until the end of the second year." Redfield on Wills, vol. 3, p. 186, says: "In the case of an annuity bequeathed, it begins from the death of the testator, and the first payment becomes due in one year thereafter; but when the interest or net income of a certain sum is given, it will not begin to run till the end of the first year from the death of the testator, and the first payment consequently becomes due in two years from that date."

Lord ELDON, in *Gibson v. Bott*, 7 Ves. 95, drew the distinction between an annuity and a legacy for life, which has been cited in every thoroughly considered case since. He says: "If an annuity is given, the first payment is payable at the end of the year from the death; but if a legacy is given for life, with the remainder over, no interest is due till the end of two years. It is only the interest of the legacy; and till the legacy is payable there is no fund to produce interest."

We think it is clear that the legacy in question cannot be regarded as an annuity.

The trustee further claims that the clause in the will which declares that "the legacies as aforesaid are to be paid within one year from my decease, at the convenience of my executors, and said executors are authorized to pay the same in stocks and bonds belonging to my estate at their cash value or in cash as may be preferred," shows that the testator intended that the legacy in question should be paid at some period or periods during the year, and not after the expiration of the year. He thus presents the point in his brief: "The period of payment within the year was to be governed by the convenience of the executors, and as bearing upon that convenience,

payment in the bonds and stocks of the testator was distinctly authorized. The case, as submitted, shows that after payment of all debts and other legacies, there existed in the hands of the executors interest-bearing and dividend-paying bonds and stocks largely in excess of the sums necessary to create the trust fund. Can it be said that the testator intended that the interest and income of these stocks and bonds should be retained by the executors and added to the *corpus* of the estate until the last day within the year after his death, and then that the fund should be paid to the trustees in those stocks and bonds or in cash? We submit, that fairly construed, it indicates an intent that the *cestui que trust* should enjoy the interest and income of the trust fund before the expiration of the year."

Still the will expressly gave the executors one year after the death of the testator in which to pay the legacy to the trustee. Payment on the last day or last hour of the year would be within the will. That payment may be made at the convenience of the executors can make no difference. They were to be the judges of their convenience. Whenever they should make payment within the year, it would be presumed that then was the convenient time for payment. They were only restricted to the year. But the will declares that payment may be made in bonds and stocks at their cash value at the time payment shall be made within the year. The bonds were interest-paying bonds, and the stocks were dividend-paying stocks. The cash value of such bonds and stocks, at any particular time, is made up of their value as representing principal or capital and the accruing interest or dividend. The value thus varies with the nearness or remoteness of the time when the next dividend will be declared or the next interest becomes payable. But the will takes no notice of this enhancement of value. The payment of \$1,000,000 may be made in their cash value at the time of such payment; no more and no less. And if payment shall be made in cash on the last day of the year after the death of the testator, the payment shall be of the sum of \$1,000,000, no more and no less. The will declares that such payment in either mode shall be full payment of the bequest. How then can interest be claimed by the terms of the will?

This would seem to be a full and complete answer to the further claim of the trustee, that a proper construction of the bequest in question shows it to be a bequest for the maintenance of the grand-

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daughter of the testator, and that so the bequest carries interest from the death of the testator, not by presumption of law, but by the will itself.

The answer is, that if the trustee is right in his claim, that the will itself shows the bequest to be given for the maintenance of the granddaughter, still the will itself declares that the payment of \$1,000,000 in cash, or in stocks and bonds at their cash value, at any time within one year from the death of the testator, shall be full payment of the bequest; not full payment of the principal sum, leaving the interest unpaid, but full payment, principal and interest, if there could be any interest. Surely the testator had the right to say how large the bequest should be which he left for the maintenance of his granddaughter, if the trustee is correct in his construction of the will.

But is he correct in that construction? He bases his claim upon the word "best" in the bequest. He presents the point thus: "The will provides, whether the ability of the father to furnish maintenance for his daughter should exist or not, that some part of the income shall, during the infancy of the daughter, as well as afterward, be paid to that daughter. It is to be such portion as that father shall consider best. Best for whom? Not best for the trustee, to diminish his own natural liability, but best for the infant. What else could be best for such infant but education and maintenance?" But many other things might be best. It might be best to withhold rather than to pay. Manifestly, the great concern of the testator, in bequeathing this very large sum of money, the interest of which would be \$60,000 per year, was the welfare of his young granddaughter, who was just entering into womanhood. There was greatly more danger that her father, the trustee, would pay her too much of this vast income during her minority than that he would pay her too little; and during such time it seems to be clear that the word "best," as used by the testator, had more reference to withholding the income than to paying it. The plain meaning is, pay her only what you think best. We think the trustee's construction of the bequest is not correct.

We therefore advise the Superior Court that the plaintiff is not entitled to interest till the end of one year from the death of the testator.

Judgment affirmed.

In this opinion the other judges concurred.

ROGERS v. ROGERS.

(28 Conn. 121.)

Trade-mark — family name.

A manufacturer has the right in good faith to use his own name as a trade-mark upon his goods, although it is the same as that of another manufacturer of like goods who uses the same as a trade-mark.

SUIT to restrain the use of a trade-mark. The opinion states the case. The defendant had judgment below.

F. Chamberlain, O. H. Platt, J. P. Platt and H. R. Mills, for appellant.

C. R. Ingersoll, C. H. Mitchell and G. A. Fay, for appellees.

STODDARD, J. As we understand the findings and rulings of the Superior Court, practically the only question left for the determination of this court is in respect to the plaintiff's exclusive right, as against these defendants, to stamp the word "Rogers" upon silver-plated flat ware, such as knives, forks, spoons, etc. In considering this subject it must constantly be borne in mind that all questions of fact are finally disposed of by the Superior Court, and that this court cannot, even by inference, supplement such finding or supply omitted facts. Under our practice this court is controlled by the finding as it comes to us. The case stands upon an answer denying the material allegations of the complaint, and in so far as the Superior Court omitted to find true the allegations and claims of the plaintiff, those allegations and claims must be regarded as not proved.

The defendants stamped upon the shanks of spoons and forks manufactured by them the combination of words "C. Rogers & Bros. A1." The plaintiff's stamp is "*Rogers & Bro. A1." The finding states in detail the use by several different partnerships or corporations of stamps all bearing the common and distinctive word "Rogers," and differing from each other in all other material respects except in the use of this common and conspicuous word "Rogers," one concern using a stamp with the word "Rogers" alone. The finding then proceeds: "By reason of the numerous stamps on spoons, forks and knives, containing the word 'Rogers,'

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as before mentioned, and of the efforts of the various concerns who have used such stamps since 1847 to promote the sale of their goods as 'Rogers goods,' the word 'Rogers' has become the conspicuous and familiar part of such stamps with a large class of retail buyers; and while jobbers and dealers, and those retail buyers who are informed of the facts, readily distinguish between the stamps of the different manufactories by the word or symbols which such stamps do not possess in common, those retail buyers of the articles who buy by the stamps or single article look only to the word 'Rogers,' and are for this reason liable to confound the various stamps; but generally the retail buyers who desire any information on the subject of the make of the goods, rely upon the dealer for such information."

It appears from the extract that there are two governing facts: 1st, that the word "Rogers" is the conspicuous, familiar, material and valuable thing in the various so-called trade-marks; 2d, that the stamp of the defendants is liable to be mistaken for that of the plaintiffs because of the use of the word "Rogers," and by that limited class alone who look only to the word "Rogers." And again the case states: "Between the stamps so used by the defendants and the stamps used by the plaintiffs upon similar articles manufactured by them respectively, the dealers and jobbers in such articles have no difficulty in distinguishing. And this is also true of those retail buyers who look beyond the word 'Rogers.' But those who regard the word 'Rogers' only would be liable to confound one with the other, as is the case of the various 'Rogers' stamps before mentioned. Retail buyers sufficiently acquainted with the various 'Rogers' stamps in the market to distinguish between the same would have no difficulty in distinguishing between the two stamps of the plaintiffs and defendants; but the general resemblance between the two stamps is such that a person knowing that of the plaintiffs and not knowing that of the defendants might, upon referring to it, but not reading it attentively, mistake it for that of the plaintiffs." Thus, with reiteration the court below emphasizes the fact that the word "Rogers" is the controlling word — the one thing that is the basis of all possible confusion or mistake in the use of the two stamps.

There is no finding or suggestion of fact that any other part of defendants' stamp is answerable in any degree for that liability to mistake. If any other part of the stamp, in configuration, collocation

or combination of words, figures or symbols, or in other respect, contributed in any manner to deceive possible purchasers and enable the defendants to sell their goods as those of the plaintiffs, it should so have been found by the trial court. This court cannot find such facts from an inspection of the stamp itself. This is not a case where this court can pronounce as matter of law that the defendants' stamp in other particulars so resembles that of the plaintiffs as to amount to a representation that the goods are the plaintiffs' goods. In this particular the case at bar differs from many of the cases cited in the briefs of counsel. In some of the English cases relied upon, and in other instances, the court determined from the evidence in the particular case whether the stamp was of an objectionable character, thus exercising a combined jurisdiction over fact and law. In our courts, as before stated, these jurisdictions are separated, the fact being committed to the Superior Court, and the law to this court.

It is said that this stamp, "C. Rogers & Bros. A1," is "stamped upon the backs of the shanks of the spoons and forks in the same manner and place as the plaintiffs' goods are and have been stamped." This is undoubtedly an evidential fact, from which the trial court might, in connection with other circumstances, have found a liability to deceive, on account of the location and peculiar characteristic of the defendants' stamps, but the court has not so found; presumptively the evidence did not warrant that conclusion; and on the contrary, the court repeatedly tells us that the word "Rogers" alone is the only possible misleading character. And further we are informed that "the method of stamping their name upon such articles manufactured by them, and the locality of the stamp upon the article, has been that commonly employed by manufacturers of such silver plated articles for many years. The mark 'A1' has been frequently used by manufacturers of such ware for many years as a mark of quality, and is so regarded in the trade." Manifestly upon this condition of facts, in the absence of a finding that the location of the stamp combining with its form, might have a misleading effect, we cannot say as matter of law that it does have that possible effect, particularly in view of this finding, that the location of the stamp is common to the trade, and the addition of the marks of quality, "A1," is commonly used by manufacturers as a quality mark. We feel constrained by the facts in the case to say that there is no foundation laid for the claim that we should rule as mat-

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ter of law that the judgment of the Superior Court is erroneous, so far as that judgment relates to the stamp in question in other respects than the use of the word "Rogers."

This appeal raises the question of error or no error upon the facts found, and "when therefore on such appeal the record omits to present facts essential to the case of the appellant, this court can simply affirm the judgment, and cannot remand the case to the lower court for amendment, or a further hearing or finding." *Schlesinger v. Chapman*, 52 Conn. 273.

Have these plaintiffs, as against these defendants, an exclusive right to the use, in their stamp, of the word "Rogers?" Upon this branch of the case there is one further fact stated as follows: "The purpose of the defendants in stamping their firm name upon the spoons, forks and knives so manufactured by them, has been to indicate to the public that they are the manufacturers of the goods so stamped. But the defendants, in commencing the manufacture of such articles, had in view the popularity in the market of such goods bearing a stamp containing the word 'Rogers,' and an inducement to commence such manufacture was the advantage they might derive from having their goods so stamped." And then the court finds: "The allegations of fraudulent design and acts on their (the defendants') part, contained in articles 11, 12, 13, 14, 15 and 16 of the complaint, are found to be not true." The 11th article contains an allegation that the defendants, "with intent to defraud" the plaintiffs, sent their goods into the market with marks closely resembling the claimed trade-marks of the plaintiff. By article 12 it is stated that by the external shape and appearance of the goods, together with the stamp and mode of selling, the defendants caused their goods to resemble the plaintiffs'. Article 13 contains an allegation that the defendants' stamp is a close imitation of the plaintiffs', and is an infringement of their trade-mark, and is well calculated to deceive, and does deceive purchasers, and induces them to buy the defendants' goods supposing them to be of the plaintiffs' manufacture. Article 14 alleges that defendants' goods will become known as "Rogers" goods, and that thereby purchasers will be led to buy the defendants' goods, believing them to be the plaintiffs'; and by article 15 it is alleged that the defendants fraudulently stamp the word "Rogers" on their goods, intending to operate as a fraud upon the public, upon unwary purchasers, and upon the

plaintiffs, in the ways above set forth, etc. So far the trial court has wholly negatived the claim of the plaintiffs that the defendants were actually fraudulent in the use of their stamp, and that such stamp was intentionally used to personate the plaintiffs' goods, notwithstanding the finding that the defendants had in view the popularity of goods marked "Rogers," and that one inducement was the advantage they might derive from so stamping their goods. But in saying that the allegations of fraudulent design and acts on their part, contained in article 16 of the complaint, are found to be not true, the trial court goes further than to deny the assertion of active personal, intentional, fraudulent design and counterfeiting, and negatives the constructive fraudulent design implied in the statement contained in that article.

Article 16 is as follows: "That by reason of the facts aforesaid the use of the word 'Rogers,' either as the whole or a part of their stamp upon spoons, forks and knives, must and will under the fixed circumstances inevitably connected with such use, necessarily infringe upon the plaintiffs' lawful enjoyment of the use and benefit of their trade-marks aforesaid, and must and will induce and cause unwary purchasers and others to purchase the spoons, forks and knives of the defendants, stamped with the word 'Rogers,' either as the whole or as a part of their stamp, in place of and supposing them to be spoons, forks and knives manufactured by the plaintiffs, to the great injury of the plaintiffs and in fraud of their rights." In this article there is no statement of active fraud, or intentionally misrepresenting the defendants' goods to be those of the plaintiffs, but only a statement that inevitably any use, no matter how honest and customary of the word "Rogers" in the stamp, will induce and cause unwary purchasers to purchase goods of the defendants' make, supposing them to be the plaintiffs', and therefore any use of the word "Rogers" in such stamp by the defendants is thus constructively fraudulent. This conclusion and assertion of the plaintiffs so stated is denied by the trial court. The plaintiffs' case is stripped by the finding of every fact collateral or additional to the mere use of the word "Rogers" in the stamp.

The plaintiffs' claim, as thus stated, is surely not warranted by any decided case or the authority of any text-writer brought to our attention. Substantially all the leading and governing facts and characteristics of the recent English case of *Massam v. Thorley's*

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Cattle Food Co., 14 Ch. Div. 748, a case that is largely relied upon by the plaintiffs, are eliminated from the plaintiffs' case. A few citations from the several opinions in that case will indicate how fundamentally different it was from the case with which we are dealing. And it should be borne in mind that this English court was considering questions of fact upon the evidence in the case. Page 755: "'Thorley's Food for Cattle' meant that food which for many years was manufactured at works belonging to Joseph Thorley, and afterward was manufactured by his executors carrying on his business at the same works." Page 456: "We have heard nothing like a satisfactory explanation of how J. W. Thorley's company came into existence, unless it was that the promoters thought that Thorley's food was a very profitable thing, and had got a great reputation, and that they should like to steal the reputation which it had acquired. In order to do that they somehow or other got into communication with a brother of the late Joseph Thorley, who for some years had been in the service of Joseph Thorley, and during those years, according to his own account, which I take to be true, had acquired a knowledge of the recipe and of the manufacture, but who for several years previous to the existence of this company had never had anything to do with the manufacture of food for cattle. Having the name of Thorley, which was the distinguishing mark of the food for cattle, he either tendered himself for sale or was found for purchase by some persons, in order that his name might be got into a joint stock company formed for the sake of selling these goods. Why was that name got in there except for the purpose of inducing the world to believe that it was the same concern, or that it was the same Thorley, or a continuation of the same Thorley, whose name was the principal characteristic of the name of the article? The name of the company is to my mind a fiction. The meaning which the name of 'J. W. Thorley & Co., Limited' would convey to any person's mind is that there had been a partnership of J. W. Thorley & Co., a real partnership, which had been carrying on business in the manufacture of this food for cattle, and that for some reason or other, such as we have seen constantly in our experience in this court, the partnership had been minded to convert itself into a limited company for the more convenient transaction of its business * * * I am therefore of opinion that in this case what the defendant company have done has been calculated to deceive,

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and I am bound to say, in my judgment, I have no doubt was from the first intended to deceive the persons purchasing their article into the belief that they were purchasing the article which Joseph Thorley had formerly manufactured at the works which had attained the great reputation which Thorley's manufacture appears to have obtained." BAGGALLAY, L. J., said: "I do not profess to say now whether J. W. Thorley, if honestly carrying on business on his own account in the manufacture and sale of this article might not call it 'Thorley's Food for Cattle,' provided he took proper precautions to prevent it being supposed that the article he was so manufacturing was manufactured by the representatives of Joseph Thorley, but I feel satisfied that the company has no right whatever to use that name. I am strongly inclined to the opinion, though it is unnecessary to decide, that according to the view of Lord WESTBURY in the *Glenfield Starch* case, the expression 'Thorley's Food for Cattle' indicates the trade denomination of the article manufactured by the particular person, but even on the assumption that the defendant company had not only the right to manufacture this article but to call it 'Thorley's Food for Cattle,' I have come to the conclusion on the evidence that they adopted such a mode of endeavoring to push that article in the market as to induce many persons to entertain the reasonable belief that the article they were so putting upon the market had been manufactured by the representatives of Joseph Thorley." BRAMWELL, L. J., said: "The complaint of the plaintiffs is not that the defendants made and sold the same article that the plaintiffs make, but that it was sold in such a way as to induce purchasers to believe that it was the article manufactured by the establishment which was Joseph Thorley's, and now is carried on by his executors. The learned counsel for the defendants admit that, if that is so, there is a cause of action against them, and that they must be restrained from doing it. The question therefore is one of fact—was the trade so carried on by the defendants as to give rise to that belief? It appears to me almost impossible to entertain a doubt upon that question." JAMES, L. J., finally announced that an injunction would issue, and Mr. Glasse, who was of counsel, said: "But it is not the substance of your Lordship's judgment that they are not to use the word Thorley in connection with their cattle food? JAMES, L. J.: "We cannot prohibit their using the name if they use it in a way not calculated to mislead the public."

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Quotations are made at such length from this case because of the importance apparently attached to it by the plaintiffs. It will be seen that the case was regarded as one where a joint stock company had assumed the name of "Thorley" with the preconceived design of inducing the public to believe that their manufacture was that of the plaintiffs, with intent to pirate the marks of origin of the plaintiffs' goods. In this view the English case goes no further than this court in *Holmes v. Holmes, etc., Manuf. Co.*, 37 Conn. 278; s. c., 9 Am. Rep. 324. Further as indicated by their opinions, the judges strongly leaned to the position that "Thorley's Food for Cattle" had, under the evidence in the case, come to indicate the trade denomination of the article manufactured by the particular person, and had obtained that secondary meaning wholly apart from its ordinary and apparent meaning, assimilating it in this particular to the "Glenfield Starch" case in *Wotherspoon v. Currie*, L. R., 5 H. L. Cas. 508. Lastly, the English case, as the final and determinate view of the case was treated as a case of intentional false representation by the defendants, in their method of advertisement by labels and method of packing goods and carrying on their business. This is shown by the refusal of the court to enjoin the use of the word "Thorley" absolutely in the cattle food business, and permitting its use so long as that use was not calculated to mislead. The rationale of the decision of *Massam v. Thorley's Cattle Food Co.* is that it was a case of actual intentional misrepresentation. The scope and limit of the ruling, in that case in regard to the use of the name "Thorley," is fixed by the decision of the same court in *Thorley's Cattle Food Co. v. Massam*, in which the court protected by injunction the "Thorley's Cattle Food Company" in the prosecution of its business in that name against circulars and advertisements of the defendants, the executors of Joseph Thorley. Both JAMES and BAGGALLAY, L. JJ., in the latter case, refer approvingly, and as containing the gist of the law, to the language of Lord Justice TURNER in *Burgess v. Burgess*, 3 DeGex, M. & G., 896, as follows: "No man can have any right to represent his goods as the goods of another person; but in applications of this kind it must be made out that the defendant is selling his own goods as the goods of another. When a person is selling goods under a particular name, and another person not having that name is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name

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he uses. But when the defendant sells goods under his own name, and it happens that the plaintiff has the same name, it does not follow that the defendant is selling his goods as the goods of the plaintiff. It is a question of evidence in each case whether there is false representation or not."

Considered in the ordinary course of trade, it is a contradiction of terms to say that a man selling goods under his own name sells them as the goods of another, even if that other have the same name. The cases seem to require some element of false representation other than that implied in the fair, honest and ordinary use of a person's own name.

An examination of the following and kindred cases, wherein the use of a person's name has been regulated, will show that in most instances conscious, intentional fraudulent misrepresentation on the part of the defendant had been resorted to; in others there was such a combined use of the name with other marks, characters, figures or form and arrangement of circulars, advertisements, etc., as to amount to a false representation, and the combination only was enjoined. No instance can be found where the use of the name only in good faith has been stopped. See *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 213; *Clark v. Clark*, 25 Barb. 78; *Sykes v. Sykes*, 2 Barn. & Cress. 541; *Metzler v. Wood*, 8 Ch. Div. 608, 610; *Fullwood v. Fullwood*, 9 Ch. Div. 179; *Devlin v. Devlin*, 69 N. Y. 214; s. c., 25 Am. Rep. 173; s. c., 27 Am. Rep. 194; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Shaver v. Shaver*, 54 Iowa, 213; s. c., 47 Am. Rep. 642; *Stonebraker v. Stonebraker*, 33 Md. 268; *Williams v. Brooks*, 50 Conn. 278; *Meriden Britannia Co. v. Parker*, 39 Conn. 450; s. c., 12 Am. Rep. 410.

Upon the other hand there has been, from the first to the present time, a general consensus of judicial opinion that the use of a personal name in a fair, honest and ordinary business manner could not be prevented, even if damage resulted therefrom. *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 13 Beav. 213; *Burgess v. Burgess*, 3 De Gex, M. & G. 896; *Faber v. Faber*, 49 Barb. 357; *Clark v. Clark*, 25 Barb. 80; *Meneeley v. Meneeley*, 62 N. Y. 427; s. c., 20 Am. Rep. 489; *Comstock v. Moore*, 18 How. Pr. 424; *Gilman v. Hunnewell*, 122 Mass. 139; *McLean v. Fleming*, 96 U. S. 252; *Carmichel v. Latimore*, 11 R. I. 395; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Singer Manuf. Co. v. Long*, 18 Ch. Div. 412. Other cases and *dicta* might be cited; but it is deemed unnecessary.

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In one brief filed for the plaintiffs it is said that they made no exclusive claim to the word "Rogers;" but there is coupled with that disclaimer a statement that the word "Rogers" is the conspicuous and valuable part of their mark, and that any use of it by the defendants in the ordinary way of manufacturers, by stamping their goods with it, either alone or in combination, will indubitably produce results which they are now striving to prevent; and in another brief filed by other counsel of the plaintiffs the broad claim is made that the word "Rogers" used as a stamp should be stopped. And as we have before said, this is the only contention left to the plaintiffs by the finding of the court below.

In conclusion we think there is neither authority nor reason in support of the doctrine that the fair, honest use of a name can be enjoined when it is used in the ordinary course of business, in the way and manner in which other manufacturers of similar goods are accustomed to use their own name in the preparation for sale, or sale of goods; that such a rule would operate in restraint of trade, and prohibit a person from using the ordinary means that all are entitled to use in the prosecution of business enterprises; that such use contains no element of false representation or personation in any just and true sense, and that while it may be true that a possibility exists that the goods of one will be purchased to some extent by persons who either know no distinction, or even by the occasional few who suppose them to be the goods of another, this condition of things is inevitable in trade and commerce, inhering in the nature of things and attaches in kind, if not in degree, in all cases where a manufacturer sends goods of any particular description, but without distinguishing mark, into a district or country where such goods were before that time unknown, and establishing a reputation in that district or country as the manufacturer and vendor of such goods. Any new comer in the same district with similar goods would undoubtedly profit by the reputation of the former's goods; yet the benefit to the public generally of free competition, and the natural rights of all to seek any and all markets would render ineffectual all attempts to shut out such new comer.

Since the preparation of the foregoing opinion the second edition of "Browne on Trade-Marks" has been distributed. That author, upon a review of the cases, lays down this proposition: "A manufacturer has a right to affix his own name to an article of his own production. And any injury which another manufacturer, having

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the same surname, may suffer in consequence thereof, is *damnum absque injuria*." Sec. 420. And in his commentary upon *Howe v. Howe Machine Co.*, 50 Barb. 236, he says: "This case is apt to mislead the superficial observer, and even for a moment stagger the preconceived notions of one used to critical examination. It has been cited more than once in support of this absurd proposition, to-wit: that when two men in the same trade have the same surname, one may employ that surname as a trade-mark, to the exclusion of any such right by the other; that is, when two brothers have made and sold sewing machines, the one who first stamped his surname upon a machine was the sole possessor of the right to stamp his workmanship with his true name. This conclusion has no warrant from any authoritative source." Sec. 423.

There is no error in the judgment of the Superior Court.

In this opinion CARPENTER and GRANGER, JJ., concurred; LOOMIS, J., and PARK, C. J., dissented.

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(53 Conn. 186.)

Negligence — dangerous premises — trespasser.

A. owned a factory standing about ten feet back from the line of the street pavement, and extending along the street about eighty feet. The space between the street line and the building had been so paved that there was nothing to indicate where the street line ended, and in front of the building A. had erected a porch which came within six feet of the street line, and through which entrance to the building was effected. Alongside of the building and adjoining the porch was a deep and unfenced area. B., who was unacquainted with the surroundings, went to the factory after dark in search of her child, fell into the area and was injured. *Held*, that A. was liable.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had only nominal damages.

T. E. Doolittle and W. L. Bennett, for appellant.

J. W. Alling and H. W. Asher, for appellee.

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STODDARD, J. [A question of practice omitted.] In the first paragraph of the complaint it is alleged that the defendant kept, maintained, and permitted to remain on his premises, substantially adjoining the highway, and so near the public footway of said highway as to make the use of the same unsafe and dangerous, a deep area or pit without rail, cover or guard of any kind.

It was not pretended in the argument that the area was not dangerous in itself, and its dangerous character is apparent from the finding. But it is said that the defendant owed no duty to this plaintiff not to maintain this dangerous pit. It is upon this theory alone that the judgment of the court below was pronounced, and by this theory that judgment must be tested, and the case be disposed of here.

There is no finding of fact in this case to disprove the allegation of the complaint that this dangerous area or pit was "so near the public footway of said highway as to make the use of the same unsafe and dangerous." The case does state certain facts from which argumentatively or inferentially the court might be led to find either that the pit was or was not so located in reference to the public way and travel thereon as to make the use of the highway unsafe or dangerous. But the court below made no finding of fact upon this point, thus leaving the legal inference arising from the demurrer to have its full effect upon this allegation in establishing its undeniable truth. This is necessarily so unless it can be said that the court, as matter of law, notwithstanding the admission involved in the demurrer, ought to say that the pit was not so located as to make the use of the highway dangerous. This position has not been taken, and we do not think it can be maintained. That question is peculiarly one of fact, depending upon all the surrounding and characterising facts, and upon the whole evidence in the cause. The location of the excavation, its proximity to the public way, the character of the use of that public way in numbers, and the manner of its use, the probabilities that travelers would or would not be endangered there, and the like general considerations, are to be weighed by the trial court in every case, and in addition to these general considerations attaching to all cases, the particular and peculiar surroundings of each special case render the question peculiarly one of fact and not of law, as a general rule. We think it is plain in this case that the question here involved is a question of fact, and so beyond our jurisdiction to de-

termine. While therefore no discussion of the fact will be made, it is perhaps proper to say that to a majority of the court it appears that the evidential facts found and stated by the trial court establish the fact as alleged in the complaint in this particular.

Under such circumstances no authority can be found warranting the treatment of such a question as a question of law to effect a result adverse to this conclusion.

This condition of facts, we feel impelled to say, created and imposed a duty upon the defendant to persons lawfully using the highway.

There is some diversity of opinion as to the test of duty and consequent liability in cases of this kind. It is said that in England and Massachusetts the test of liability is whether the excavation be substantially adjoining the public way, so that a traveler by a false step or misstep might be endangered; and the cases of *Howland v. Vincent*, 10 Metc. 371; s. c., 43 Am. Dec. 442; *Hordcastle v. South Yorkshire Ry. Co.*, 4 Hurl. & Nor. 67; *Hounsell v. Smyth*, 7 Com. B. (N. S.) 729, are cited on this point.

Without stopping to inquire whether this is a correct statement of the rule in England, a different and much more satisfactory test and rule prevails in this State.

The Massachusetts case cited above certainly adopts that theory; but we do not think it is authoritative. The case is discredited as authority by our own court in *City of Norwich v. Breed*, 30 Conn. 547. Our court plainly implies that the ruling was wrong. It is denied in express terms in *Beck v. Carter*, 6 Hun, 604; and see the same case in the Court of Appeals, 68 N. Y. 284; s. c., 23 Am. Rep. 175. It is adversely criticised in Bigelow's *Cases on Torts*, 686, 689, and is pronounced in Shearman & Redfield on Negligence, 505, "a decision which it is difficult to justify." A late Massachusetts case seems to ignore the rule as applied in *Howland v. Vincent*, and approximates the test to that of our court in *City of Norwich v. Breed*, *Mistler v. O'Grady*, 132 Mass. 139. This last case substitutes for the test stated in *Howland v. Vincent* this language, that the defendant "had no reason to suppose" that any person would attempt to go where the danger was, and that the plaintiff was not "misled by any act or word of the defendant;" a statement of the rule which plainly imposes a duty on this defendant.

The rule laid down in the *City of Norwich v. Breed* was stated after an examination of the Massachusetts case and English cases

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cited above, was declared upon full consideration, and places the liability upon true grounds, and has been cited in other jurisdictions with approval. An extract or two from that case will suffice. "We think that in making the defendant's liability to depend upon the dangerous condition in which the excavation was left by the defendant rather than upon its distance from the street, the judge adopted the true criterion. It is the dangerous character rather than the exact location of the excavation that determines the duty and consequent liability of the defendant in this respect. * * * Whether the excavation could, with a due regard to the rights of passengers on the street, be left unguarded, or could not, depended upon the question whether being unguarded it endangered the travel or not; if it did not, no matter how near it was to the line of way; if it did, no matter how far it was removed."

It is plain that there was a duty upon the defendant in reference to the public use of that public way. The next inquiry is, whether that duty attached to the defendant in reference to this plaintiff. The defendant claimed and the court ruled that the plaintiff was a trespasser upon the defendant's property, and was not in the exercise of any rights as a traveller upon the highway.

The material facts bearing upon this part of the case are, that a building used by the defendant as a corset manufactory stood on his premises, extending along the entire street line of eighty-eight feet, and set back ten feet from the line of the public way. The entrance to this building was in front, and consisted of an inclosed wooden porch with a door in the front. The door of the porch was five feet and from six to nine inches from the street line. An area was located alongside the building, and adjoins the porch, and is ten feet and nine inches long, two feet and nine inches wide, and five feet and four inches deep. A brick paved public sidewalk was laid along the front of the factory, and three or four years ago the open space between the sidewalk and the building was paved with brick on the same grade as that of the brick sidewalk, thus forming an unbroken and continuous brick sidewalk covering the entire space between the roadway of the street and the defendant's building. There was nothing to mark the exact line of separation between the sidewalk and the defendant's lot. Thus the defendant was maintaining an extension and continuance of the public sidewalk along the entire front of his building up to the line of his building, in the midst of a large city, where the familiar condition

of affairs is that the public pavements extend to the line of building. This extension of the public sidewalk was of the same material and constructed in the same manner as the public sidewalk. It was on the same grade, nothing to indicate the place where the public walk ended, and apparently to the eye causing the public walk to extend to the factory.

On the night in question the plaintiff was told that her child was in the defendant's factory. She lived in Collis street, and only a few feet from Franklin. Collis street is a street leading into Franklin street, nearly opposite the south end of the factory. On the evening of the 17th of November, about eight o'clock, going for her child "she went along the Collis street sidewalk to the corner of Franklin street, and then she took a direct line toward and to the wooden porch of the factory, crossing Franklin street diagonally. In trying to find the door she fell into the area. She was unfamiliar with the premises, and did not know of the existence of the area, and is found not to have been negligent in fact in not avoiding the area. The front fence lines of the property owners at either end of the defendant's shop indicated, in a general way, the line of the public way.

And now it is said that the plaintiff was a trespasser in thus going upon this part of the brick pavement placed upon the defendant's property. We think the defendant's point is not well taken. The entire space up to the factory was apparently a public sidewalk; it does not appear that she knew any thing to the contrary. She had a right to use the whole of the apparent public way to reach the defendant's shop. Her errand there was lawful. She had a right to go there, and it will not answer for the defendant to say to the plaintiff, "true it is that by my act there was an apparent, visible, manifest public walk which extended to my shop, but you a stranger must be held to know where the divisional line is, although I have so built and maintained the sidewalk that you are naturally misled thereby."

There is no principle of law or justice which will warrant a court in holding a person to be a trespasser who uses as a public way an apparent public sidewalk kept so by the act of the defendant, simply because he steps over the technical legal boundary line. By the construction of the walk the plaintiff, as one of the public, was told in a most emphatic way that the sidewalk extended to its full apparent width. The occasion was in the night season; the plaintiff was

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not familiar with the premises; it is not found that she knew or could have seen the fence lines at either end of the defendant's property. The defendant's acts would indicate, even if a person knew where the technical line of the street was that the defendant had thrown open to the public and made part of the public domain that part of his property covered by this extended sidewalk; and much more so as to a person who did not know where the line was.

The streets of our cities especially in the mercantile and manufacturing districts, are full of instances where the buildings are set on the street line or at varying distances therefrom, with similar continued and extended pavements. To impose upon persons lawfully using our sidewalks the duty of ascertaining at their peril where the technical divisional line lies before venturing to use the sidewalk as it openly and visibly exists, is in our judgment not warranted by any authority; and to permit owners and occupiers of such property to construct and maintain unguarded pits and areas in those parts of their premises that are not distinguishable from the public way, will fatally jeopardize public travel.

In *Corby v. Hill*, 4 C. B. (N. S.) 562, COCKBURN, C. J., said: "The proprietors of the soil held out an allurements whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. * * * Having so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent to them to place thereon any obstruction calculated to render the road unsafe."

In *Beck v. Carter*, 6 Hun, 607, it is said: "Even if the road had been proved to have been laid out two rods wide, and a few feet belonging to the plaintiff lay between the road and the fence, as it has always been left in common with the road and thereby apparently devoted to the public use, any person would be justified in using it in that way. The fair inference to be drawn from its situation, thus acquiesced in by the owner, is that it has been abandoned to the public. * * * If a house or store is built a few feet from the margin of the street or highway, and no fence is erected along or near the margin, persons are at liberty to assume that the building is on the margin of the street, and that they may lawfully travel over the whole space thus apparently set apart for public use by the owners

of the land. * * * To authorize an owner of land adjoining a highway to require travellers lawfully passing along it to keep within the limits of it, as laid out or dedicated, he must indicate in some proper way where the boundaries are, and when that is done, he is relieved from liability for injuries sustained outside such limits. To hold a traveller, a stranger to the locality, bound to keep within the limits of a lane or alley, in the night as well as in the day, and that the owner of adjoining land may dig pits in his land five or six or seven feet from one of the margins of the street, and if the traveller falls into it and is injured he is without remedy against the owner of the land on which such pit is dug, is so monstrous, so unjust, and so unreasonable, that it needs but to be stated to be repudiated."

But the case at bar is far stronger than the New York case, touching which this language is held. Here the owner and occupier of property had so constructed and built the extension of the sidewalk as to induce and allure people to use it as and to suppose it to be a part of the public way. As to persons lawfully using it he thus constituted it an inseparable part and parcel of the public way. Persons using it within the scope of the purpose so plainly indicated by the owner are not trespassers, and are protected by the law from dangerous excavations, pits and traps.

In the Court of Appeals, *Beck v. Carter* is thus treated: "It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had by use long continued, been made, for the time being, a public place and part of the highway. * * * The boundary of the alley was not defined, and persons crossing the lot in the usual way were not trespassers." 68 N. Y. 293; s. c., 23 Am. Rep. 175.

The case in hand presents not only the public use spoken of by the Court of Appeals, but superadded to that as a characteristic thing, the personal acts of the defendant in so constructing and using his property as to make it a part of the highway. "There may possibly be," says the court, in *Binks v. South Yorkshire R. Co.*, 3 Best & Smith, 253, "cases where the owner of land adjoining a way may by his acts induce the public to go near to an excavation in his land so as to get into danger; in which case it would be the same thing whether the way were a highway or not."

It is stated as a fact in the first count of the complaint that the plaintiff was passing along said public footway of said highway,

etc., and fell in, etc. The demurrer as before suggested, in the first instance admits this, and this fact stands except as modified by the other facts found.

The bare fact that she passed without [knowledge on her part (for this want of knowledge, if material, is admitted because not disproven), beyond the technical line of the street, is by no means the determining fact in relation to the question whether she was in the exercise of a traveller's right. A traveller's right is not confined to simply passing along the street. He may use the public way for any of the whole range of ordinary acts incident to ordinary travel, not the least of which is the right of approach and entry to an adjoining building for a lawful purpose. And for all these purposes the highway is to be regarded as it apparently exists, as against the defendant who has actually enlarged the width of the highway.

So far this case has been treated upon the theory and facts set forth in the first count of the plaintiff's complaint. That count confessedly proceeds upon the assumption that the plaintiff was in the exercise of a traveller's rights upon a public highway. The plaintiff fearing that she might be met with the objection that the plaintiff had passed beyond the theoretical line of demarcation, and therefore was not technically a traveller, by amendment inserted a second count, in which the physical facts surrounding the area are stated precisely as they are proved and hereinbefore recited; and in addition thereto, particularly alleged that the plaintiff "was passing along said public way, and from the said public way passed over and upon the said brick pavement of the defendant."

It is now claimed that the second count is identical with the first, notwithstanding the first count alleges that she was a traveller, and the second count states every fact which is relied upon by the defendant to establish his vital proposition that she was not a traveller. The second count also is framed in strict accord with the letter and spirit of the Practice Act. It "contains a statement of the facts constituting the cause of action;" and if those statements are substantially established, the right of recovery follows; and this is the result without reference to the plaintiff's *status* as a traveller; for the substance of that count is that she, the plaintiff, was induced by the acts of the defendant to pass from the public way to and upon the defendant's premises.

We understand the law to be so, that if a person is induced or allured upon another's premises, the owner or occupier of such

premises owes a duty to such person to see that his premises are in a reasonably safe condition, and that this duty attaches to the defendant in reference to the personality of the allured individual. Upon these facts the right of action is complete even if the plaintiff was not a traveller. It is therefore immaterial to inquire whether the plaintiff called herself a traveller. Even if she had said in the complaint in express terms that she considered herself a traveller and entitled to protection in that character, but the court should be of opinion that she was not at the time of the injury technically a traveller, but that she was upon the facts alleged and proved entitled to protection as an individual, there can be on that ground no objection to a recovery. The plaintiff was not bound to state in the complaint the legal theory of her case; nor is the legal theory in any case material, except, possibly, where the form of action is material to the rights of the parties.

The Court of Appeals in *Hemmingway v. Poucher*, 98 N. Y. 287, states the rule in this language: "The party was under no obligation to state in his pleading the theory of the law upon which his claim is based."

And we also think that this second count is properly framed to obviate the objection that the plaintiff was not a traveller. The first count alleges that she was a traveller, and we think the second count is not a meaningless repetition of the first count. That it accomplishes its evident design is clear, and forces us to examine the case as presenting the question (assuming the plaintiff not to have been a traveller), whether the plaintiff was or was not induced or allured to enter upon the defendant's property. In this view of the case, as we have already stated, the character of a traveller is not essential to the plaintiff's right of recovery.

If the plaintiff was induced by the defendant to come, or allured upon the defendant's land, it is not necessary for the plaintiff to claim that a highway existed, either actual or imputed, as against this defendant. But if the defendant had dedicated to the public a right of passage, or had so constructed his sidewalk as to induce people to believe that the public right of way existed, and therefore as to a person so supposing and acting thereon that public right should be held to exist, this condition would have a very material bearing upon the question of allurement or inducement. For if there was an apparent public way a person, though not strictly a traveller, has a right to proceed upon the assumption that

guards against dangers are provided co-extensive with the apparent purpose and use of the way.

Reverting now to our original proposition, that the effect of the demurrer to this complaint is to admit the truth of every material well-pleaded fact as stated, except so far as such statement of fact may be modified or controlled by the facts found upon the hearing, we find by reference to the second paragraph of the second count, a statement of fact that the defendant "kept and maintained on his own land, between the public footway or pavement on said Franklin street and said pit or area, a brick pavement or footway, in all respects like the public pavement or footway, separated in no manner therefrom, and invited, licensed and permitted the public to make use of the same in the same manner and to the same extent that they made use of the public way, from which it was in no manner to be distinguished by the eye."

This statement of fact certainly is not denied by any direct statement in the finding, but on the other hand, it is in substance and effect confirmed and established by the finding; for it is found that the public sidewalk had been widened and continued up to the defendant's building, and so kept and maintained by him, and that there was nothing to mark the exact line of separation. That the sidewalk on the defendant's premises was paved with brick in the same manner as the public footway, and was on the same grade, is also found. Thus the finding in substance accords with the allegation in this particular.

But it is said that the front fence lines of the adjoining owners would indicate to the ordinary traveller the general line and course of the sidewalk. Assuming this, and assuming also that such indications would exist in the night season when the front fence lines might not be seen, or if seen, would probably not be effective, yet that fact does not help the defendant as to the controlling fact that he had so built, kept and maintained his sidewalk as to induce people to go beyond the line of the adjoining front fences. Besides the accident happened in the night season, and there is no fact in the case to lead to the belief that the plaintiff was cognizant of the line of those front fences or knew of their existence even.

In the leading case of *Sweeny v. Old Colony R. Co.*, 10 Allen, 373, BIGELOW, C. J., giving the opinion says: "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition

for those who come upon and pass over them, using due care, if he has held out any invitation, allurements or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but if he directly or by implication induces persons to enter or pass over his premises, he thereby assumes an obligation that they are in a safe condition suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby."

The plaintiff alleges that it was by reason of the existence of the pavement on the defendant's land, constructed as it was, that he passed beyond the limits of the highway. Instead of controverting this allegation the facts found support and confirm it. It may be more certainly indicated that this part of the defendant's premises was "intended to be used by visitors or passengers," and "adapted and prepared for such use," than by existing facts. Continuing a public sidewalk over it? He built a sidewalk so that every person whose interest or inclination was to do, would naturally enter upon it supposing it was for public use, and therefore properly guarded.

126 Mass. 546, and *Mistler v. O'Grady*, 132

"The question is, did a reasonable regard for the safety of those to whom the use to which the defendants' premises might be expected to bring there, require the defendants to take safeguards at this gangway?" *Low v. Grady*, 319; s. c., 39 Am. Rep. 331.

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Crogan v. Schiele.

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sance, § 137. In *Vanderbeck v. Hendry*, 34 N. J. Law, 471, it is said: "It has been substantially held that although a way may not have been dedicated to the public, or otherwise legally established for the use of the public, yet if the owner of premises over which it passes has exhibited an intention that it shall be used by the public, either as a means of access to his property or over it, and by the manifestation of that intention has induced or allured the public to use it, those using it within the scope of the purpose manifested are entitled to be protected from dangers to the way by reason of obstructions or interferences created during its existence, and resulting from the want of ordinary care on the part of the owner or those acting within his authority."

Authorities to the same point, in great numbers, firmly establish a principle of law that imposed a duty upon an occupier of land. The extent of that duty is co-extensive with the use to which he subjects his premises.

Under some circumstances trespassers are protected; in others, trespassers are at their own risk, while visitors are entitled to a reasonably safe passage; and in others still the public have rights that the occupier cannot safely ignore.

Trespasser the plaintiff was not; and whether she be regarded as a visitor by invitation going upon private property, or one of the public in the enjoyment of a public right by using an apparent public way as a means of access to the defendant's building, and being injured by a "concealed source of mischief," she was entitled to recover substantial damages.

There is error in the judgment of the Superior Court.

Reversed and remanded.

In this opinion GRANGER, J., and PARK, C. J., concurred; CARRINGTON and LOOMIS, JJ., dissented on the point of pleading.

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COHEN V. PEMBERTON

(58 Conn. 221.)

Sale — severable contract

The defendant bought of the plaintiff hats, caps, collars and gloves, by an order classifying the goods according to kind, style and price per dozen. The parties understood that each article was to be itemized and carried out at one-twelfth of the price per dozen. In the printed heading of the bill rendered by the plaintiff was a statement that "all claims must be made in three days." Some of the articles did not conform to the order, but were not returned for a month. *Held*, (1) that the contract was apportionable, and the defendant could not be held for goods not conforming to the order; (2) that he was entitled to a reasonable time to return such goods; (3) that the question of reasonable time was for the jury.

ACTION for goods sold. The opinion states the case. The plaintiff had judgment below.

E. P. Arvine, for appellant.

E. P. Gager, for appellee.

LOOMIS, J. The complaint seeks to recover the price of merchandise, consisting of hats, caps, collars and gloves, sold and delivered to the defendant pursuant to his written order, which is annexed to the finding as an exhibit. The order classified the goods wanted according to the kind and style — each class occupying a line by itself, on which was given the size and over it the number desired of that size; at the left the numbers were summed up in fractions of a dozen, and at the extreme right the price of a dozen was given. Take for example the first line in the order, which also in part involves the matter in dispute:

" $\frac{1}{2}$ doz. rat high college $6\frac{1}{2}$, 7, $7\frac{1}{2}$, $7\frac{1}{4}$ \$18.50"

The goods were sent in boxes, accompanied by the plaintiff's bill, which on its face showed a full compliance with the order. The bill had also a printed heading: "All claims must be made within three days after receipt of the goods." The defendant kept the goods about a month before he had occasion to open the boxes, and then for the first time discovered that some of the caps were not of the size required by his order and not of the size indicated by the

sance, § 137. In *Vanderbeck v. Hendry*, 34 N. J. Law, 471, it is said: "It has been substantially held that although a way may not have been dedicated to the public, or otherwise legally established for the use of the public, yet if the owner of premises over which it passes has exhibited an intention that it shall be used by the public, either as a means of access to his property or over it, and by the manifestation of that intention has induced or allured the public to use it, those using it within the scope of the purpose manifested are entitled to be protected from dangers to the way by reason of obstructions or interferences created during its existence, and resulting from the want of ordinary care on the part of the owner or those acting within his authority."

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Trespasser the plaintiff was not; and whether she be regarded as a visitor by invitation going upon private property, or one of the public in the enjoyment of a public right by using an apparent public way as a means of access to the defendant's building, and being injured by a "concealed source of mischief," she was entitled to recover substantial damages.

There is error in the judgment of the Superior Court.

Reversed and remanded.

In this opinion GRANGER, J., and PARK, C. J., concurred; CARPENTER and LOOMIS, JJ., dissented on the point of pleading.

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Cohen v. Pemberton.

COHEN V. PEMBERTON

(58 Conn. 221.)

Sale — severable contract

The defendant bought of the plaintiff hats, caps, collars and gloves, by an order classifying the goods according to kind, style and price per dozen. The parties understood that each article was to be itemized and carried out at one-twelfth of the price per dozen. In the printed heading of the bill rendered by the plaintiff was a statement that "all claims must be made in three days." Some of the articles did not conform to the order, but were not returned for a month. *Held*, (1) that the contract was severable; and the defendant could not be held for goods not conforming to the order; (2) that he was entitled to a reasonable time to return such goods; (3) that the question of reasonable time was for the jury.

ACTION for goods sold. The opinion states the case. The plaintiff had judgment below.

E. P. Arvine, for appellant.

E. P. Gager, for appellee.

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" $\frac{1}{2}$ doz. rat high college $6\frac{1}{2}$, $7\frac{2}{3}$, $7\frac{2}{3}$, $7\frac{1}{2}$\$18.50"

The goods were sent in boxes, accompanied by the plaintiff's bill, which on its face showed a full compliance with the order. The bill had also a printed heading: "All claims must be made within three days after receipt of the goods." The defendant kept the goods about a month before he had occasion to open the boxes, and then for the first time discovered that some of the caps were not of the size required by his order and not of the size indicated by the

labels thereon, and such goods he returned to the plaintiff, who refused to receive them, on the ground that each dozen or fraction of a dozen was an entire contract which must be rescinded *in toto* or not at all, and also that the offer to return was not made within a reasonable time; and therefore he claimed to recover for all the goods originally delivered. The court, as matter of law, in its charge to the jury adopted the first-mentioned claim of the plaintiff, and as the defendant conceded, he did not return all of any one of the classes consisting of a dozen or fraction of a dozen, a verdict against him was inevitable.

In thus applying the law which the plaintiff invoked as to the entirety of contracts the court was doubtless influenced by such propositions as are laid down in *Clark v. Baker*, 5 Metc. 459, and *Mansfield v. Trigg*, 113 Mass. 350. It is not our present purpose to discuss the propositions referred to, nor to examine and apply the nice distinctions that obtain as to the divisibility of contracts.

In *Mansfield v. Trigg* the court, while holding that a sale of a specific number of packages of an article at a given price per package was an entire contract, also held that "the rejection and return of an article of a different kind or description, not answering to the terms of the contract, do not stand upon the ground of this decision, nor does the right to return them depend upon the existence of a warranty."

The defect claimed was not one of quality, but of size in respect to hats and caps. The suggestion is now made that as the extent of variation did not appear it might have been trivial, but no such point was made in the court below. The court in its ruling assumed that the claimed variation was so substantial, that if it existed as to each article composing the class, the whole might have been returned. The finding shows that the defendant on his part distinctly claimed that the variation in size was such that the articles rejected were of no use to him. We shall therefore assume for the purposes of this discussion that the variation was substantial and not trivial and immaterial. We can readily see that it might have been so material as to render the article returned a different thing from that specified in the order, so as to come within the rule last suggested. It must be borne in mind that the identity of a thing within the meaning of the rule does not depend on its being of the same class or kind, but rather on its adaptation to the wants and uses of buyers.

The local merchant presumably has his regular customers, who require hats and caps of definite sizes, and he makes his order on the wholesale dealer with reference to this and to the probable demand. If one of the retailer's customers sends to him for a $7\frac{1}{2}$ hat, and one is sent, so labelled, but which proves to be a $6\frac{1}{2}$ or even a 7 in size, it would at once be conceded that the customer could reject it as a very different thing from what he ordered. A difference which is so material between the retailer and his customer, must also be important as between the wholesale and retail merchant.

In *Gardner v. Lane*, 12 Allen, 44, A. undertook to pay B. a debt by delivering to him a hundred and thirty-nine barrels of No. 1 mackerel. A. delivered part No. 1 mackerel, and forty-six barrels of No. 3 mackerel. B. actually received the mackerel but did not open the barrels. C., a creditor of A., attached the No. 3 mackerel as A.'s property. B. undertook to affirm the sale, claimed the property as his own, and replevied it. On the trial C. claimed that no property in the No. 3 mackerel had passed to B., as the claimed delivery was a non-performance. B. claimed that the difference between No. 3 and No. 1 was a difference in quality, and that the title did pass subject to his right to rescind. The court held the difference between No. 1 and No. 3 mackerel to be a difference in kind, and that no title passed to B. in the No. 3 mackerel, because his contract for sale was for articles of a different kind, and that he had never assented to receive the No. 3 mackerel by reason of his want of knowledge; and so the attaching creditor held the goods.

In *McEntyre v. McEntyre*, 12 Ired. 299, and in *Waldo v. Halsey*, 3 Jones (Law), 109, the proposition is stated as everywhere admitted to be law, that "if one, not having seen them, orders goods of a certain description at a certain price, and the goods do not answer the description, he may return them or offer to return them within a reasonable time." In the last-mentioned case the order was for bags of a certain size, and the only defect was that they were of less size.

If then we should concede that the order for each dozen or fraction of a dozen was an entire contract, and that the hats or caps sent were materially different in size from those ordered, the plaintiff himself was in default as to his contract, and could not recover any thing, except for the fact that partial performance had been accepted and full performance waived by the act of the defendant.

It seems to us that the court should have charged the jury in substance according to the defendant's request referred to in his fifth assignment of error.

It is suggested that the application of the principle under consideration might work injustice to the plaintiff by compelling him to deduct the proportionate price of a single article returned when the contract estimated the price only by the dozen, but a more critical examination of the contract found in the defendant's order and the plaintiff's acceptance of it, as indicated in his bill rendered, will lead to a different construction.

So far as the disputed items are concerned there is no instance where an entire dozen is ordered, and the price for a dozen is always given, whether the fraction is large or small, but the plaintiff's bill carries out the proportionate price. In two instances only one article of the class is ordered and it is entered as $\frac{1}{12}$ of a dozen (we refer to the item "colored beaver gloves"), and yet the price of the dozen is given, namely, \$54; but in the plaintiff's bill, in addition to the price per dozen, the charge is carried out as \$4.50, being precisely $\frac{1}{12}$ of the price per dozen. We think there is enough appearing to justify the inference that the statement in dozens was merely for convenience in accounting, and that the parties understood the order to mean the same as if each separate article was itemized and carried out at a sum indicated by taking one-twelfth of the price given for a dozen. We think therefore the consideration by the true construction of the contract was susceptible of division and apportionment.

Our reasoning has a bearing also on the question whether the contract was entire or divisible, which as we have already indicated, we do not intend to decide.

The remaining question relative to a reasonable time for returning the goods rejected has no importance except with a view to another trial, for as under the charge of the court and the conceded facts the defendant could not return the goods at all, there was no occasion to consider the question of reasonable time for such return. The presumption is that the jury did not pass upon the question. But had it been before them, the charge as given would seem to be correct. It was as follows: "What is a reasonable time is a question for the jury and to be determined in view of all the evidence and circumstances attending each case. What would be reasonable time under one set of circumstances might not be in another. You

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will take into consideration the order given, when given, the time when goods were received, the nature of the goods, the season for selling them, the acts of the parties, and all the circumstances, and view the matter in a common-sense and reasonable light."

In a matter within the exclusive province of the jury, if the questions of fact are fairly submitted to them, it is not error for the court to omit all comment upon the bearing and weight of the evidence.

It has been suggested that as the printed heading of the bill sent to the defendant required that "all claims must be made in three days," and none were in fact made for a month, the question of reasonable time must be decided adversely to the defendant. As no reference was made to this fact in the court below and no claim was predicated upon it, we are not required to comment upon it. With a view however to another trial it may be well to say, that as the case is presented, these words formed no part of the contract between these parties, and the defendant was not thereby limited to the time mentioned to make his objections to receiving the goods.

The case of *Beane v. Tinkham*, 14 R. I. 197, fully supports this position.

There was error in the ruling complained of, and a new trial is ordered.

New trial ordered.

In this opinion PARK, C. J., and CARPENTER and GRANGER, JJ., concurred; STODDARD, J., dissented.

NICHOLS v. MCCARTHY

(33 Conn. 200.)

Fraud — voluntary conveyance — re-conveyance.

A feeble and penurious old man, whose wife had sued him for a divorce and was threatening a suit for alimony and had contracted debts in his name and without his knowledge, conveyed away all his property without consideration, but it did not appear that he intended to defraud his wife or creditors. *Held*, that he might recover the property again.

SUTT to set aside conveyances. The opinion states the case. The defendant had judgment below.

W. H. Williams and E. B. Gager, for appellant.

W. C. Case and T. J. Fox, for appellees.

STODDARD, J. At the time of the transfer in question in November, 1881, the grantor and donor, Martin L. Blackman, was about sixty-eight years of age, and during his life had accumulated in a small tin shop and hardware business property valued at about \$36,000, of which \$20,000 was in real estate, and \$3,000 deposited in savings banks, the remainder being his stock in trade and appliances for carrying on his business. He was childless. His first wife had died in December, 1880, and on the 8th of May, 1881, he married again, and on the 3d of November, in the same year, his wife instituted proceedings for a divorce, claiming alimony, and attached his property for \$20,000. He made an arrangement with his wife's attorney by which he gave to the attorney, as trustee for his wife, a note for \$9,000, secured by mortgage upon his real estate and payable at his death. He was at this time it is found, "in a feeble physical condition; he was miserly and penurious; his wife had contracted debts in his name, and without his knowledge," and was threatening suit for support. "These things, together with the complaint for divorce and attachment for alimony, greatly excited him, and he was in great fear that he was going to lose his property."

William McCarthy is a nephew of Blackman and Mary Ann McCarthy is the wife of William. Said William, and especially Mary Ann, appear to have largely enjoyed the confidence of Blackman, and excepting his counsel, they are the only persons with whom he consulted.

Blackman claiming that his arrangement with his wife had failed in its purpose, at his request William and Mary Ann went with him to consult counsel with reference "to disposing of his property, setting aside said note and mortgage of \$9,000, and instituting proceedings for a divorce from his wife," and William and Mary Ann "each rendered him such assistance as they could," and appear to have been fully advised as to his wishes and purposes.

As the result of such conferences with counsel on the 9th day of November, 1881, Blackman executed and delivered to Mary Ann a trust deed of all his real and personal estate. This deed was accepted by William and Mary Ann McCarthy, and by the terms of the

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deed Mary Ann became a trustee, and Blackman a beneficiary of the trust. The deed is expressed to be in consideration "of the conditions and trusts hereinafter recited." It is drawn with deliberate care, with full appreciation of the circumstances and conditions relating to the present and future life of the grantor, the amount and situation of his property, and the persons whom he desired to make objects of his bounty. The conditions of the deed provide for a monthly payment by the grantee to the grantor of the sum of \$87, that the amount and condition of the personal property conveyed shall be kept good by the grantee, and that the title to the personal property should not become absolute in the grantee until all the conditions of the deed were complied with. The money payments and trusts named in deed are charged upon all the property conveyed.

The grantor reserved to his own personal life use some portion of the real estate, and by the fifth clause he provides that at his death one-half of the appraised value of his estate shall be paid over to the then living children of his adopted daughter, and then he charges this last named trust upon the lands.

By the sixth clause he provides that the grantee shall keep the buildings at all times painted and in as good repair and condition as they now are, that she shall keep them insured, and that the insurance shall be assigned to the grantor as collateral security for the performance of the trusts and conditions therein named, and that she shall also keep the taxes and assessments on the lands and property paid up. And then, at the conclusion of the deed, super-added to all these repeated attempts to charge and bind the property to the performance of these trusts and conditions, the grantor further provided as follows:

"But to this deed there is this additional condition, viz.: If the grantee shall fail and neglect to fulfill any of the conditions of this deed specified above to be performed in the life-time of the grantor, and he should decide to avail himself of such breach by giving notice thereof to the grantee, then this deed shall become void; otherwise, to remain in full force forever."

Under the facts stated in the finding of the committee and the provisions of this deed Mary Ann McCarthy was a trustee and Blackman *cestui que trust* of the rights and interests reserved to and provided for Blackman in and by the deed. She and her husband, by their own volition, occupied confidential relations as to

the disposition of his whole property, and were giving him and he receiving from them aid and advice respecting the same, and from their personal and family relations a state of personal confidence existed.

This being the state of affairs on the 9th of November, 1881, on the 17th day of the same month Blackman executed and delivered to Mary Ann a warranty deed of all his real estate, and on the 19th he executed and delivered to her a bill of sale of all his personal property. These conveyances were without consideration and are claimed as gifts.

Before commenting upon the peculiar features of these last conveyances it will be well to refer to some of the doctrines that govern cases wherein voluntary dispositions of property have been claimed by the trustee against the beneficiary in the trust, and the rules that guide and control courts of equity as to gifts by persons in confidential, advisory and fiduciary relations.

[Omitting extracts from Story Eq. Jur., §§ 307, 311; Pom. Eq. Jur., §§ 955, 958; and Perry Trusts, §§ 168, 194, 195, 197.]

The decided cases support these doctrines of equity stated by text-writers to the fullest extent, and in all cases where a contract or gift is claimed adversely to the beneficiary in the trust relation, as *cestui que trust*, client, ward, etc., courts of equity not only require of the trustee, attorney, guardian, etc., the most ample and convincing proofs of the entire fairness of the transaction, and possession of full information, knowledge and intentional action on the part of the beneficiary, after competent and independent advice and deliberate consideration, but courts also set aside such contracts and gifts with great freedom, either as void from their intrinsic nature, or voidable because of the absence of the required proofs of full consideration, deliberate action, independent, intelligent and competent advice, rational design, etc. The action, gift, contract, etc., must not only be intentional and with knowledge enough on the part of the beneficiary to care for his ordinary affairs, but such intentional act and knowledge must be characterized by these other elements in its composition.

This presumption of inequality in dealing, and the casting of this burden of proof upon the *cestui que trust*, guardian, attorney, etc., arises from the trust relation itself. *Cowee v. Cornell*, 75 N. Y. 100; s. c., 31 Am. Rep. 428. In *Curson v. Belworthy*, 3 H. L. Cas. 742, a contract was set aside because it was "improvident

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and hastily carried into execution." And see remarks of Lord Justice TURNER in *Baker v. Monk*, 4 De G. & S. 392. In *Morgan v. Minetti*, 6 Ch. Div. 648, a gift by client to solicitor was set aside, and BACON, V. C., said that the rule absolutely prohibited such gifts. This may be a somewhat stronger statement of the rule than prevails in other jurisdictions. But the settled doctrines of equity make it almost impossible that such a gift can prevail.

The case of *Savery v. King*, 5 H. L. Cas. 655 (CRANWORTH, L. C.), was of a gift by a son after arriving at full age to his father. The father was required "to justify what has been done; to show, at all events, that the son was really a free agent, that he had adequate independent advice, that he was not taking an imprudent step under parental influence, and that he perfectly understood the nature and extent of the sacrifice he was making, and that he was desirous of making it."

In *Rhodes v. Bate*, 1 Ch. App. Cas. 257, the language of the court is: "I take it to be a well-established principle of this court that persons, standing in a confidential relation toward others, cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. Age and capacity are considerations which may be of great importance in cases in which the principle does not apply; but I think they are but of little if any importance in cases to which the principle is applicable. They may afford a sufficient protection in ordinary cases, but they can afford but little protection in cases of influence founded upon confidence."

The case of *Archer v. Hudson*, 7 Beav. 560, was of a gift by a niece, who had just come of age, to her uncle, who was regarded as standing *in loco parentis*. It is there said that the court "will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent of any sort of control." See also *Maitland v. Backhouse*, 16 Sim. 58.

The case of *Anderson v. Elsworth*, 3 Giff. 154, illustrates the

extent and rigor of application of the doctrine in England. A voluntary deed made by a woman "of about seventy years of age and not incompetent, was set aside after her death for the reason that the deed was improvident, and because it did not appear affirmatively that she understood the whole nature and effect of the deed. This decree was made after the death of the grantor and in favor of volunteers, and although the court found 'that Elizabeth Marston (the grantor) certainly had a distinct intention to give her property to Mary Elsworth, who takes it by this deed to the exclusion of all other persons.'"

In all these classes of cases when such contracts and gifts are set aside, it is assumed that the intent to make them exists. But the question is not "whether she knew what she was doing, had done or proposed to do, but how the intention was produced." Lord ELDON in *Huguenin v. Bassley*, 14 Ves. 300. *Prima facie* a purchase by a trustee from his *cestui que trust* cannot stand. *Spencer's Appeal*, 80 Penn. St. 332; s. c., 10 Am. Rep. 684; *Smith v. Townsend*, 27 Md. 368. In cases of contract between attorney and client it is said in *Dunn v. Record*, 63 Me. 19, adopting the language of Judge STORY: "The burden is upon the purchaser and not upon the client to establish the perfect fairness, adequacy and equity of the transaction." The transaction must be fair and equitable, and the client must be fully informed of the nature and effect of the contract, sale, gift, etc. *Kisling v. Shaw*, 33 Cal. 440.

The books are full of cases holding substantially the same language.

Can the deed of November seventeenth and the bill of sale of the nineteenth be vindicated, tested by these rules?

These conveyances regarded, as they evidently were, as one transaction, were a voluntary conveyance of all the grantor's property to another. It is said in *Anderson v. Ellsworth*, 3 Giff. 169: "Nothing could be more improvident than for a woman at her time of life to dispose of the whole of her property so as to leave for herself nothing. No doubt the gift was to a person with whom she was living and who was kind to her."

Did the grantor and donor "fully understand the nature and effect of the transaction?" He had but eight days before made an entirely different disposition of his property, for the purpose of arranging with his wife, and not as a gift, whereby his property was secured for his own use, and for the ultimate benefit of the children

of his adopted daughter, by which his interests were fully protected by a large number of carefully drawn provisions, having the interests of himself and those children in view, charging all his property with these trusts and conditions; and notwithstanding all the controlling inferences to be drawn therefrom, it is said that he within these eight days voluntarily released all of these safeguards, gave away his power to provide for himself in his old age so carefully provided for in the first deed, relinquished all idea of providing for the natural objects of his bounty, the children of his adopted daughter, who occupied so prominent a part of his well considered scheme embraced in the first deed, and in addition made this voluntary conveyance to the same person whom he had but just before controlled by so many prudently devised stipulations and conditions.

Moreover, it is found that the grantee and her husband have no other property except this so conveyed to them. Intrinsically viewed, could any thing be more irrational than to say that the grantor did this thing with full knowledge and with a settled intent?

There is absolutely nothing in the case to indicate any real change of mind on the part of the grantor as to the disposition of his estate. Is it to be believed that this miserly and penurious old man would, under any circumstances, voluntarily and intentionally give away all his property, and especially that he did so on November seventeenth after so distinctly declaring his contrary intent by the deed of November ninth?

But it is said that the committee find that these conveyances were voluntarily made, and without importunity from any one; that Blackman had sufficient mental capacity to transact business, and that he understood the business he was doing.

As a matter of course the gift was voluntary; that is the assumption in all cases of this character. But was it fair, equitable, made upon competent and adequate advice, and looking at all the facts and circumstances? Did these conveyances embody his real intent?

He was feeble in body, and greatly excited for fear of losing his property because of threatened litigation. Has this trustee, this donee of trust property, shown to the satisfaction of a court of equity that this gift was not the result of his feebleness and of the condition of his mind greatly excited over the contemplated loss of his property? Why this great excitement at the prospective loss of his property if all he desired was to rid himself of its burden?

Additionally, the conduct of all these parties for a long time after these conveyances indicates clearly that the real intent of this transfer was not a gift, for it is found that "the receipts from the store and tin shop, and the rents from tenements on said property, were paid to Blackman, and the business of said store and tin shop down to the time of this action were conducted by Blackman." In a word, all the parties have at all times treated this property as if these conveyances were inoperative, and as if Blackman was the real owner. This is wholly at war with the theory that it was a fair, free gift, made upon full knowledge and information.

Mary Ann McCarthy, the donee, took part in the transactions that resulted in the so-called gift. She was a party to them, and assisted in the consummation of some of the details of the transaction after the first deed. She was in the full confidence of Blackman, the trust relation continued both as a presumption of law and as a matter of fact, and now this donee of a trust estate says she can hold the trust property because she did not advise the gift but that it was made through the advice and influence of one Michael Kenney, "a Michigan lawyer." There is no such finding in the case, and it is only by inference that this is claimed. But courts of equity will not resort to inferences to find facts not expressly found to sustain gifts of this kind. The burden of proof is on the donee to prove clearly and satisfactorily all things essential to sustain the gift.

Plainly the advice of Kenney to Blackman, if such advice was acted upon, was wholly incompetent and inadequate, unless there are other reasons than those appearing in the case; and if there are other facts and reasons tending to sustain this gift the donee must prove them.

Even if it should be admitted that the dealings of Kenney with Blackman constituted the independent advice so strongly insisted upon in the books, and even if that advice had been competent and adequate, she fails to fill the measure of proof requisite as to the fairness and equity of the gift; and certainly the evidence as to a real intent to deliberately and freely give is weak, doubtful and unsatisfactory.

If it should be admitted that on the seventeenth of November Blackman intended to give, absolutely and freely, this property to Mary Ann McCarthy, the fact that he had so radically changed his mind since he executed the deed of the ninth not only in respect to

his personal interests and future life, but with reference to the other objects of his bounty, would, when taken in connection with his miserly and penurious disposition, and the state of great excitement that he was in, indicate strongly that he was incapable of appreciating the actual condition of himself and his property, and the relations of himself to that property and to those whom he so shortly before intended should be joint beneficiaries with her; and under either hypothesis the gift cannot prevail.

The finding of the committee that he had sufficient mental capacity to transact business, and that he understood the business he was doing, is not conclusive upon the question of intent, and is too brief, narrow and inconclusive; for this language is used in connection with references to his ordinary business; and even if he did know that he was executing a warranty deed and bill of sale, there is no evidence that he fully realized the whole scope and effect of his acts.

It is claimed on the part of the defendants that the conveyances made by Blackman were made to evade a threatened attachment of his property in a suit to be brought by his wife for her support, and that even though the case be one where in other circumstances a court of equity would set aside the conveyances, yet it will not lend its aid to a party to recover property conveyed away for such a purpose.

It is a well settled rule that where a debtor understandingly and deliberately conveys away his property to defraud or hinder his creditors, a court of equity will not lend him its aid to recover the property back. But this is a defense which it is certainly very inequitable for these defendants to make, standing as they do in a confidential relation to the grantor. It is not perhaps an established qualification of the rule mentioned, that a person who, in retaining property conveyed to him, is himself guilty of a fraud, cannot avail himself of the prior fraud of the grantor for the purpose of keeping the property, but such a qualification of the rule is at least implied in *Railroad Co. v. Durant*, 95 U. S. 579, and *Byington v. Moore*, 62 Iowa, 470. Such a qualification seems a reasonable one. However this may be, we think the case does not come within the application of the general rule for another and perhaps more decisive reason. In the first place, it is not found that Blackman made the conveyances to avoid the threatened suit. It is only found that "his wife had contracted debts in his name

without his knowledge and was threatening suit for support;" and that "these things, together with the complaint for divorce and attachment for alimony, greatly excited him, and he was in great fear that he was going to lose his property." This is hardly equivalent to a finding that he made the conveyances to evade the claims of his wife or of his creditors. In the next place he was in a state of great excitement. The facts detailed show the agitated condition of his mind. The divorce suit and attachment for alimony was a matter gone by and settled, but which yet contributed to the disturbance of his mind. It had previously been found that he was in feeble health, and an old man. In these circumstances, what he did in his excited state of mind, in really a panic, ought hardly to be regarded as done with a deliberate intent. It was the hasty and inconsiderate work of a mind somewhat broken at the best, easily agitated, and by the agitation thrown off its balance. We think that in the circumstances the conveyances should not be treated as conveyances in fraud of creditors, and that the court should not make it a ground for refusing its aid to recover the property back.

In conclusion, we think it apparent that this gift of a *cestui que trust* to the trustee was improvident and irrational, hastily made not upon due consideration, nor with competent, independent advice, wanting the elements of fairness and equity, that the presence of a real intent to give freely and deliberately is not proved, or that he was mentally unable to make a valid gift to his trustee.

The plaintiff remonstrated against the acceptance of the report of the committee because "it was in evidence and not contradicted that Kenney, a Michigan lawyer, advised Blackman that the trust deed was good for nothing, * * * and that the subsequent conveyances, to-wit, the deed of gift and the bill of sale, were executed under the advice of Kenney, and that Blackman was made to believe, and did believe, that these conveyances were necessary to enable his counsel to obtain proper relief from the threatened acts, etc.; but the committee made no finding upon the subject." To this statement in the remonstrance the defendants demurred, thereby not denying the accuracy of the statement.

Assuming then that the committee did refuse to so find, it must have been on the theory that it was not important; and it is upon this theory that the court below went in overruling the remonstrance. If that advice, as claimed, was given, and Blackman did,

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in fact, make these last conveyances, not for the purpose of making a gift to Mary Ann McCarthy, but being so advised in order to obtain relief from threatened litigation, then that fact is conclusive against the validity of this gift; for as has been said so often, unless the gift is really and freely made, with the real, deliberate intent to give, the transaction cannot be sustained. The committee should have found one way or the other on this subject, if there was evidence in the case pertinent thereto and a finding was claimed, and this is alleged in the remonstrance, and for the purposes of this case, admitted.

The court erred in overruling this part of the remonstrance; but it is understood upon the argument of this case that the plaintiff now only seeks to set aside the deed of November 17th and bill of sale of November 19th; and as we are of opinion that upon the facts found and stated in the committee's report, those conveyances must be set aside, the judgment of the Superior Court is reversed.

All concur.

Judgment reversed.

 GRISWOLD V. NEW YORK AND NEW ENGLAND RAILROAD CO.

(58 Conn. 371.)

Carrier — negligence — free pass — limitation of liability.

A boy sixteen years old was employed by the keeper of a restaurant at a station on the defendant's railroad to sell sandwiches and fruit on the trains, and had a free pass for the purpose over the whole road, conditioned that the company should not be liable for any personal injury caused by the negligence of its agents. The boy, while going for a private purpose over a part of the road to which he was not called by his business, and while in a baggage-car against the rule of the road, was killed by a collision caused by the gross negligence of the defendant's servants. The company had no interest in the restaurant, but gave the pass as a favor. *Held* that the defendant was not liable.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

S. E. Baldwin and *E. D. Robbins*, for appellant.

W. C. Case and *P. S. Bryant*, for appellee.

* See *Seybolt v. N. Y., etc., R. Co.* (95 N. Y. 562), 47 Am. Rep. 73.

LOOMIS, J. The plaintiff's intestate, Charles P. Griswold, was a boy about seventeen, employed by the keeper of a restaurant at the defendant's station in Waterbury to sell sandwiches, fruits, etc., on all trains coming into Waterbury, having a free pass for that purpose between Hartford and Fishkill. His employment did not require him to travel as far east as Plainville, but his mother lived there, and he often went there to visit her. In July, 1883, he was at Plainville for this purpose and boarded a train bound thence for Hartford in order to stop off at Clayton and look at the wreck of a train there, caused by a collision the day before. The train had two passenger cars, and the conductor saw him on one of them just after the train started, but afterward, without the conductor's knowledge, he went into the baggage car, and while there a collision occurred with another train coming westerly (there being but a single track) which wrecked the engine and baggage car and killed the intestate. He was at the time riding on a free pass which provided that the person accepting it assumed all risk of accident, and expressly stipulated that the company should not be liable under any circumstance, whether of negligence of their agents or otherwise, for any personal injury. The defense was placed on three independent grounds:

1. The complaint was demurred to upon the ground that the action was brought for the sole benefit of the estate of the intestate, when it should have been for the benefit of the widow or heirs;
2. That the intestate was guilty of such contributory negligence as would prevent recovery; and
3. That at the time of the injury he was travelling on the defendant's train without the payment of any fare, under an agreement or condition expressly assuming all risk of accident and stipulating that the defendant should not be liable in any event for injuries resulting from the negligence of its servants or otherwise.

As our views of the last question will be decisive of the whole case we will confine our discussion to that, and waive the other two questions.

Before we come to the discussion of the question whether under the conditions of the pass the law will protect the defendant from liability, it will be necessary to determine whether the pass was gratuitous or upon consideration; for if the latter is true, the defendants must be held to their full responsibility as carriers of passengers. The plaintiff contends that the pass was part of the con-

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sideration to induce Chickering to open a lunch-room in the defendants' station at Waterbury, but the finding is silent in regard to this, and we are not justified in assuming that it was an element in the negotiations or was in the mind of either party. It was on the other hand obviously an after-thought, and when asked for by Chickering he did not refer to it as a thing promised by Holbrook or any one on behalf of the company. It was not claimed as matter of right under any contract duty, but merely as matter of favor, and as such we must hold it to have been granted.

The question of consideration should be determined as in any other case of contract. The existence of some selfish motive (if any) impelling the act renders it none the less a gratuity in the eye of the law if there was no obligation at all to furnish the pass. The restaurant business belonged exclusively to Chickering, whatever may have been the incidental benefits to the railroad company.

And besides, it is to be observed that at the time of the injury the intestate was not travelling at all in the interest of the restaurant, but solely to gratify a personal curiosity which could by no possibility be any benefit direct or indirect to the railroad company. So that on the whole we have no hesitation in calling his pass a pure gratuity.

We have then a case where the defendant gave a free pass upon the express condition that the passenger would make no claim for damages on account of any personal injury received while using the pass, in consequence of the negligence of the defendant's servants.

But the plaintiff, as the personal representative of the one receiving the pass, has instituted a suit in direct violation of the condition. In ordinary transactions such a breach of good faith, to say nothing of the breach of contract, would be disgraceful, but there may be great considerations of public policy which will conceal the private features of the transaction and make the stipulation invalid in the eye of the law.

By the English decisions it is clear that the carrier has full power to provide by contract against all liability for negligence in such cases. *McCawley v. Furness R. Co.*, L. R., 8 Q. B. 57; *Hall v. N. East. R. Co.*, L. R., 10 Q. B. 437; *Duff v. Great North. R. Co.*, L. R., 4 Ir. 178; *Alexander v. Toronto, etc., R. Co.*, 33 Upp. Can. 474. This last case is almost identical with the one at bar.

In the United States we find much contrariety of opinion. Some State courts of the highest authority follow the English decisions and allow railroad companies, in consideration of free passage, to

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contract for exemption from all liability for negligence of every degree, provided the exemption is clearly and explicitly stated. *Wells v. N. Y. Cent. R. Co.*, 26 Barb. 641, and same case, 24 N. Y. 181; *Perkins v. N. Y. Cent. R. Co.*, 24 N. Y. 208; *Bissell v. N. Y. Cent. R. Co.*, 25 N. Y. 442; *Poucher v. N. Y. Cent. R. Co.*, 49 N. Y. 263; s. c., 10 Am. Rep. 364; *Magnin v. Dinsmore*, 56 N. Y. 168; *Dorr v. N. Jersey Steam Nav. Co.*, 11 N. Y. 485; s. c., 62 Am. Dec. 125; *Kinney v. Cent. R. Co.*, 32 N. J. Law, 409; 34 N. J. Law, 513; s. c., 3 Am. Rep. 265; *Western, etc., R. Co. v. Bishop*, 50 Ga. 465.

Other courts, also of high authority, concede the right to make such exemption in all cases of ordinary negligence, but refuse to apply the principle to cases of gross negligence. *Ill. Cent. R. Co. v. Read*, 37 Ill. 484; *Ind. Cent. R. Co. v. Mundy*, 21 Ind. 48; *Jacobus v. St. Paul & Chicago R. Co.*, 20 Minn. 125; s. c., 18 Am. Rep. 360. And other State courts of equal authority utterly deny the power to make a valid contract exempting the carrier from liability for any degree of negligence. *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1; *Mobile & Ohio R. Co. v. Hopkins*, 41 Ala. 486; *Penn. R. Co. v. Henderson*, 51 Penn. St. 315; *Flinn v. Phila., Wilm. & Balt. R. Co.*, 1 Houst. (Del.) 469.

The Supreme Court of the United States in *Railroad Co. v. Lockwood*, 17 Wall. 357, where a drover had a free pass to accompany his cattle on their transportation, held, in opposition to the New York and English cases, that the pass was not gratuitous because given as one of the terms for carrying the cattle for which he paid. The reasoning of BRADLEY, J., was directed so strongly to the disparagement of the New York decisions that it might have indicated an opposition to the principle of those cases in other respects, had not the opinion concluded with this distinct disclaimer: "We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire." The reasoning and the conclusions of the court therefore must be considered as all based on the assumption that the passenger paid for his passage. The conclusions of the court were: "1. That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law. 2. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants."

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We are not disposed to attempt to controvert the soundness of these propositions as applicable to passengers for hire, but it remains an open question what is reasonable in the case of a free passenger? Will a just sense of public policy allow any distinction? It seems to us the two cases cannot be identical in the eye of the law or of public policy, but that there is ample ground for a distinction.

In the first place, the arrangement between the parties ought not to be regarded as a contract with the railroad company in its character as a common carrier, and therefore the stipulated exemption is no abdication of that rigid responsibility which the law imposes on common carriers. The gratuitous accommodation concerns only the immediate parties, unless in a very indirect way, by making the fare of other passengers higher. If however fares are unreasonable, they may be subject to governmental regulation. But it will suffice to say that the remote and indirect effect alluded to cannot make the exemption void on the ground of public policy. Many other gratuities and charities might be named, which though conceded to be commendable, would have a similar effect.

Again in *Railroad Company v. Lockwood*, and in other cases advocating the same doctrine, one prominent reason given for holding the contract void as opposed to public policy is that in making the contract the carrier and his customer do not stand on a footing of equality; that the latter is only one individual against a powerful corporation, which has him in its power, and that he cannot afford to higggle in regard to terms. It is manifest that this reasoning has no application at all to a free passenger. If his position is not superior, it is at least equal to that of the railroad company. The latter will not often be found urging the acceptance of free passes. There is no possibility of any higgling on the part of the passenger for more favorable terms, and the solicitation for the pass itself will come from the latter also. Under these circumstances it does not seem reasonable to add to a free gift of transportation the burden of insuring the passenger against all personal injuries arising from the negligence of the carrier's servants, the risk being well known and willingly assumed by the passenger as the condition upon which the gift is made.

But it may be suggested that there is involved in negligence, especially where the safety of life is concerned, a moral as well as legal culpability, which renders such contracts of exemption void as against public policy. But those who regard this argument as

decisive must, it seems to us, overlook the fact that there may be and very often is negligence that would be called gross on the part of servants, for which there is no moral culpability at all on the part of the master. The parties contracting for the exemption under consideration well know that railroad passengers are continually exposed to risks arising from some momentary lapse of memory or attention on the part of servants, who have gained a high reputation for skill, prudence and carefulness, and who were, it may be, selected on that account. A large percentage of accidents will be found to have resulted in the way suggested without any actual fault on the part of the officers of the corporation. Now the finding in the case at bar is explicit that the injury to the plaintiff's intestate resulted from the gross negligence of the defendant's servants. This restriction is exclusive, and is to be understood as used in contradistinction to negligence on the part of the corporation itself through the acts of those who properly represent it.

By the rule of *respondent superior* a corporation is made liable for the negligence of its servants, but where the principal has done the best he could the rule is technical, harsh and without any basis of inherent justice. As applicable ordinarily to corporations it is of great practical convenience and utility. We do not therefore advocate its abolition, but we contend that in a case like the present, where there is no actual fault on the part of the principal, it is "reasonable in the eye of the law" that the party for whose benefit the rule is given should be allowed to waive it in consideration of a free passage. It is not the case where a party stipulates for exemption from the legal consequences of his own negligence, but one where he merely stipulates against a liability for imputed negligence in regard to which there is no actual fault. It is easy to see therefore that considerations of public policy have no application to such a case.

Where a master uses due diligence in the selection of competent servants, and furnishes them with suitable means and machinery to perform the service in which he employs them, he is not answerable to one of them for an injury received in consequence of the negligence of a fellow servant, while both are engaged in the same service. Here the rule of *respondent superior* is waived, and it is generally put on the ground of implied contract, and if a waiver may be implied in such case why not give effect to an express agreement in the case of a free passenger?

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The Roman law, with its clear sense of justice, made a distinction, similar to the one for which we contend, in determining the liability of the mandatory for the negligence of his agents. Where the business of the mandatory required the interposition of sub-agents he was liable for the negligence of such sub-agents only on the ground of *culpa in eligendo*, supposing that he knew or could have known their incompetency.

The foregoing reasoning, as it seems to us, will also furnish a complete answer to the claim that the defendant must be held liable on account of the gross negligence of its servants, for it is manifest that the principal is no more culpable in the one case than in the other; and the rule of *respondere superior* being waived, the protection is complete.

The word "negligence" in the stipulation for exemption is used in its generic sense and comprehends all degrees. And we may add that some high modern authorities have expressed strong disapprobation of any attempt to fix degrees of diligence or negligence, because the distinction is too artificial and vague for clear definition or practical application. See the opinion of the court in *Railroad Company v. Lockwood*, *supra*.

The only remaining question to be considered is whether the minority of the plaintiff's intestate, which rendered him incapable generally of making contracts, will render his assent to the limitation or condition of the pass void also.

But a minor has capacity in law to accept a free gift, either absolute or conditional. If the condition or limitation is reasonable, he cannot accept the gift and reject the condition or limitation, for that would enlarge the gift, which of course cannot be done without the consent of the donor. If the intestate did not like the gift as made he should have declined to accept it, and not attempt, as his personal representative is doing, to make it include in effect, contrary to its terms, an insurance against risks arising from the negligence of the defendant's servants.

There was error in the judgment complained of and it is reversed and the case remanded.

Judgment reversed.

In this opinion the other judges concurred.

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(58 Conn. 390.)

Conflict of law—foreign attachment.

The defendant, a resident of Indiana and owning stock in a bank there, pledged the certificate, with a blank power to sell and transfer to a corporation in Connecticut, as collateral security for a loan of considerably less than the value of the stock. *Held*, that neither the stock nor the surplus interest in it could be reached by attachment in Connecticut. (*See note, p. 129.*)

ACTION for money, The opinion states the case. The defendant had judgment below.

A. P. Hyde, for appellants.

H. C. Robinson and *W. F. Henney*, for appellees.

CARPENTER, J. Complaint for a money demand, served only by process of foreign attachment. The plaintiffs and defendants are non-residents. No property was attached except that alleged to be in the hands of the garnishee. The defendants appear for the sole purpose of pleading to the jurisdiction.

The plea alleges that the plaintiffs are residents of the State of New York; that the defendants are residents of the State of Indiana; that no personal or other service of process has ever been made upon the defendants or any of them; that no service of the original process was ever made otherwise than upon the Connecticut Mutual Life Insurance Company, named therein as garnishee; that said garnishee was not indebted to the defendants or either of them, and had not at the time of the service any effects or estate of the defendants or either of them in its hands that could be attached or secured by the process of foreign attachment.

The reply denies that part of the plea which alleges no indebtedness by the garnishee and no estate in its hands. The finding shows that at the time of the service the defendants were indebted to the garnishee in the sum of \$200,000, and that the garnishee held as collateral security therefor certificates of stock in the Indianapolis National Bank located in the State of Indiana, to the value of \$240,000, with a blank power to sell and transfer the same. This

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stock was transferable only on the books of the bank, and had not been transferred.

Upon these facts the Superior Court found the issue for the defendants and dismissed the complaint. The plaintiffs appealed.

The question is, whether the attachment will hold any surplus there may be in the bank stock after paying the defendants' indebtedness to the garnishee.

The case of the *Middletown Savings Bank v. Jarvis*, 33 Conn. 372, throws some light on this question. Jarvis pledged certain stock in the Middlesex Quarry Company to the savings bank to secure a loan. The stock was transferred to and stood in the name of the bank. Rowland, a creditor of Jarvis, attached his equitable interest in the stock in the mode provided by statute for attaching stock and sold it on an execution, the officer transferring such interest to the purchaser. Jarvis afterward assigned his interest in the stock to others. On a bill of interpleader brought by the bank, the attaching creditor held the stock subject to the lien of the bank. Counsel for the assignees claimed that Jarvis' interest in the stock could only be taken by a bill in equity or by the process of foreign attachment. Counsel for the attaching creditor contended, in an elaborate brief, that foreign attachment would not reach it. Of course the main question was, whether the stock was well attached. The court held that it was. Strictly speaking, the court had no occasion to say that it could not be attached by foreign attachment; but the court, by McCURDY, J., says: "We do not see very well how the case comes within the provisions of the law of foreign attachment, but it certainly does come precisely under the statute to which we have referred."

Now if the stock in the present suit was the stock of a domestic corporation, that case is a precedent for holding that it might have been attached directly by the ordinary process. That being so, it was not subject to the law of foreign attachment, for it was not concealed. In its nature it was as incapable of concealment as real estate. It was at all times visible, accessible property, and open to attachment.

Does the fact that it is stock of a foreign corporation change the law in this respect? We think not. No good reason occurs to us why the rule should be different in the two cases. The stock in Indiana is just as accessible to these creditors as it would have been if located in this State. The statute law of Indiana provides for an

attachment of stock. Rev. Stats. of Ind., 1881, § 723. Section 931 makes the corporation liable as garnishee in respect to "any share or interest in" its stock. Legally there is no hardship in requiring them to go there, where in contemplation of law the stock is situated, instead of coming here. By coming here they can only succeed upon the theory that the stock is in some sense located in this State. Such a theory is inconsistent with a familiar and well-settled rule, that stock in a corporation for the purposes of an attachment has its situs where the corporation is located. Again, if the insurance company held the stock in its own name simply as security for the debt, it would have held nothing that it could have been compelled to deliver to the officer to be seized and sold on an execution. There was no indebtedness that it could have been compelled to pay, because it was not owing the defendants. Whatever liability there was, hinged upon two contingencies — that the stock should be sold by the garnishee, and that it should bring enough to leave a surplus after paying its claim against the defendants. Surely such a liability is not subject to the law of foreign attachment. If the defendants redeem the stock, as they may, they will be entitled to an unconditional re-transfer of the stock to them. The obligation to reconvey is not a debt subject to a garnishee process. The only way in which a surplus in such a case can be reached, before it is ascertained and becomes a debt, is to attach the stock, as was done in the case of *Middletown Savings Bank v. Jarvis, supra*, subject to the pledge.

Thus far we have assumed that the title to the stock stands in the name of the garnishee. But it does not. That fact and one other, namely, that this is stock in a foreign corporation, distinguish this case from the case referred to. The distinction in both respects is unfavorable to the plaintiff. We think it is very clear that the insurance company was not indebted to the defendants. It had not become the owner of the bank stock or any part of it, and so was not indebted to the defendants for any surplus. No part of the stock had been sold; consequently nothing had been received to apply on the debt of the defendants, much less to pay over to the defendants. It will hardly do to say that the insurance company was the owner because it had control of the stock and had it in its power at any time to become the owner. There is a difference between the possession of property and the mere naked power to possess it. The power to possess it in this case was not to be

exercised except in a certain contingency, and that contingency had not happened. The parties contemplated a permanent loan, to continue at their pleasure. Should the debtor desire to pay, or should the creditor require it, it was supposed that the money would be paid, and that the bank stock would never in fact be transferred or sold. The power of sale was given simply as a means of compelling payment. Manifestly it cannot be said in a legal sense that the creditor now owns the stock or owes for it. The law will not regard that as done which the parties under existing circumstances intended should not be done. The defendants for all practical purposes still own the stock. They alone can vote on it and receive the dividends. They have the substance, while the garnishee has but the possibility of a title.

The only other ground on which the garnishee can be held is, that it has the goods and effects of the defendants in its hands so concealed that they cannot be attached by ordinary process. That the stock itself is not in the garnishee's hands is, we think, a proposition that requires no further argument. That the certificates, with authority to sell and a power of attorney to transfer are in its hands, must be conceded. But the certificates are not the stock. "The stock of a corporation," says Mr. Lowell, "may be defined as the sum of all the rights and duties of its stockholders. * * * Each share therefore is but a fraction of all the rights and duties which compose this sum. * * * A share of stock in a corporation consists of a set of rights and duties between the corporation and the owner of the share."

These rights and duties are in fact and law quite distinguishable from the certificates and the power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but is not in law the equivalent of those rights and duties. They are muniments of title, but not the title itself; much less the real property.

While these certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property (see *Ayres v. French*, 41 Conn. 142), yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself, which is simply evidence of the

debt, is not. So with stock. That may be attached, but the certificates cannot be.

Again. The books of the bank show that the title to the stock is in the defendants. As there can be no transfer of the stock except on the books of the bank, no title can exist, except in the original subscribers, by any other means than a transfer. Our own court has said, in *Northrup v. Newtown & Bridgeport Turnpike Co.*, 3 Conn. 544, that "the transfer of stock on the books of a company does not operate by giving notice of an antecedent conveyance, but is a fact essentially necessary to originate a title before the happening of which registration no title has been or can be transferred." But the bank is a foreign corporation. No part of its capital or property is within the jurisdiction of this court. The certificates and authority to transfer are held by one of our citizens; but we cannot through them reach the stock or take any action relative thereto which the authorities of the bank or the courts of Indiana are bound to respect.

It was suggested, that these assignments and powers of attorney being executed in blank, the officer may sell them at the post and deliver them to the purchaser, and that he may fill the blanks so as to have the stock transferred to himself. But meanwhile what becomes of the rights of the insurance company? It has the undoubted right to retain the possession of the certificates as its security; and we know of no power in our courts to compel it to part with them at the instance of another creditor. How then is the officer going to deliver possession to the purchaser?

If we attempt to compel a sale of the stock for the purpose of paying the debt due to the garnishee and in that way reach the surplus for the attaching creditor, we shall encounter another difficulty. The loans secured by the pledge are to remain so long as it pleases the parties. We know of no process or principle by which the court can directly compel the insurance company in this proceeding to collect those notes against its wishes. The statute of Indiana (§ 939, Rev. Stats. of 1881), expressly provides that "a garnishee in attachment shall not be compelled, in any case, to pay or perform any contract in any other manner or at any other time than he would be bound to do for the defendant in attachment." On this subject Jones on Pledges, § 372, says: "A creditor of the pledgor could not compel the pledgee to accept payment of the debt before its maturity, even if he could compel such acceptance

in any case. It is only by statute that this can be done. Though it has been intimated in a few cases that possibly an attachment of pledged property might be sustained upon payment or tender to the pledgee of the amount due him, yet it is doubtful whether this can be done without express statutory authority therefor. A resort to this expedient seems to have been generally regarded as too hazardous to attempt in the absence of any direct authority to sustain it." To the same effect is Drake on Attachments, § 539.

If then the garnishee refuses to sell the stock, how is the sale to be effected? If the stock was within this jurisdiction so that it could be attached by ordinary process and sold subject to the lien of the insurance company, under the implication of our statute, which provides that "rights or shares in the stock of any corporation" may be attached (Gen. Stats., p. 402, § 6), the purchaser might remove the incumbrance by paying the debt. Thus indirectly the company might be compelled to receive its money. We know of no other way in which it may be done; and as the stock is in another State that way is not open to creditors in this State.

The equity of redemption in this stock is subject to the garnishee process in the State of Indiana, as we have seen. As the corporation is there, the defendants' interest in the stock may there be reached by creditors. That of itself is well nigh a conclusive argument against attaching it here. If liable to attachment in both States, a serious conflict of jurisdiction would be the probable result.

We desire to be understood as limiting the operation of this principle to the circumstances of this case—being, as it is, an attempt to reach the pledgor's equitable interest by a process of foreign attachment.

And this opinion is not to be interpreted as being in conflict with those legal rules and principles designed to facilitate the sale and transfer of stocks, or as interfering in any way with the convenience of the business public in that regard. This was a pledge and not a sale of stocks. Delivery of certificates of stock with a blank power of attorney to transfer doubtless may be a good symbolical delivery, but it is not actual delivery for all purposes. Symbolical delivery, as its name imports, is a substitute for actual delivery, when the latter is impracticable, and leaves the real delivery to be made afterward. As between the parties the whole title passes by such a delivery when that is their real intention. But when the transaction is a mere pledge—placing the title at the control of the

pledgee for the mere purpose of securing a debt, without actually transferring the title, no title passes, for the simple reason that that is not what the parties intend. They intend simply security. If a right to the title, with the means of enforcing it, is satisfactory to the parties, courts will not by a forced construction of the transaction inject, so to speak, a title into the pledgee.

A good illustration of giving effect to a symbolical delivery, according to the intention of the parties, is afforded by the case of *Cook v. Hallett*, 119 Mass. 148, a case cited by the plaintiff's counsel. A. delivered to B. a certificate of stock as collateral security for a debt. B. thereupon surrendered the certificate to the corporation and took out a new certificate in his own name as trustee. A. paid the debt and B. delivered the certificate to A. with a power of attorney in blank to transfer the stock. After this, and before the stock was transferred on the books of the corporation, B. was summoned as trustee of A. in a process of foreign attachment. It was held that he was not liable. The delivery of the certificate to A. operated as a symbolical delivery of the stock, until the real delivery could be perfected on the books of the corporation. There the parties intended to pass the title; here they did not. If they had so intended the transfer would have appeared on the books of the bank, for apparently there was no obstruction or hindrance to such a transfer. But that is not what the parties intended. They intended simply a pledge, constituting the insurance company at most a special owner in equity for a particular purpose, leaving the defendants the general owners for all other purposes. Now we cannot, through and by means of that special right and power vested in the insurance company, draw this stock away from the location of the corporation and the domicile of the general owner and bring it within the jurisdiction of the courts of this State. The general rule, as stated by text-writers, is that personal property pledged cannot be attached in the absence of any statute authorizing it. *Jones on Pledges*, § 372; *Drake on Attachments*, § 539; *McConnell on Trustee Process*, § 116, *et seq.* and cases cited. See also *Lippitt v. American Wood Paper Co.*, 14 R. I. 301. If by this it is intended to say that property pledged cannot be attached so as to prejudice the rights of the pledgee, it will doubtless be accepted as a correct statement of the law; but if it is intended to go further and say that if the pledgee is satisfied, by the payment of his debt or otherwise, even then it cannot be attached, the proposition, to say the least, is

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questionable. It may be difficult to assign any good reason why a debtor under such circumstances may object to an attachment. But we have no occasion to discuss this question. Our present inquiry concerns only stock in a corporation. When and to what extent that is attachable in this State depends entirely upon statute law.

In Maine, Massachusetts and some other States, it is provided by statute that pledged property may be attached, and the attaching creditor is required to pay the debt within a limited time, and he thereafter holds the thing pledged by his attachment, free from any incumbrance. In Indiana, as we have seen, any interest in the stock of a corporation may be taken by a garnishee process, making the corporation the garnishee. In Connecticut any right, legal or equitable, in such stock, may be taken by ordinary attachment, and that has been held to apply to the pledgor's interest in stock pledged and standing in the name of the pledgee. *Middletown Savings Bank v. Jarvis, supra.*

Thus the question before us, in one aspect of it, resolves itself into the question of the construction of our statute. Obviously the statute can have no operation outside the limits of the State. When it speaks of "rights or shares in the stock of any corporation," it has exclusive reference to corporations existing under our laws, and cannot affect rights in corporations existing under the laws of other States. Therefore the statute referred to does not authorize the attachment of defendant's interest in the stock in question.

It is further contended that this interest may be attached under the general statute relating to attachments, it being the policy of our law to subject all a man's estate not specially exempt to the payment of his debts. But that statute relates to ordinary process and not to the process of foreign attachment; it is limited, and must be limited, to property in this State; it has and can have no extra territorial operation.

It follows that the plaintiffs take nothing by their attachment, and that there was no error in dismissing the complaint.

Complaint dismissed.

In this opinion the other judges concurred.

NOTE BY THE REPORTER.—The question of the extra-territorial effect of transfers of personal property arises most frequently in respect to assignments for creditors and receiverships.

It is an elementary rule that a transfer of property in *invitum* is inoperative beyond the territorial limits of the government under whose laws the transfer

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is made. Story Conf. of Laws, §§ 410-412; *Harrison v. Storry*, 5 Cranch, 239, 302; *Hibernian Nat. Bank v. Lacombe*, 21 Hun, 166; s. c., 84 N. Y. 307; s. c., 88 Am. Rep. 518; *Kelly v. Crapo*, 45 N. Y. 86; s. c., 6 Am. Rep. 35; *Crapo v. Kelly*, 16 Wall. 610; *Hoyt v. Thompson's Exr.*, 19 N. Y. 206, 224; *Willits v. Waite*, 25 N. Y. 557; *Osgood v. Maguire*, 61 N. Y. 529; *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 450; *Edgerly v. Bush*, 81 N. Y. 204; *Dalton v. Currier*, 40 N. H. 237; *Osborn v. Adams*, 18 Pick. 247; *Walters v. Whitlock*, 9 Fla. 86; *Hutcheson v. Peshine*, 16 N. J. Eq. 167.

Whenever such a transfer is recognized and given effect by the courts of a foreign government, the courts act upon the principles of international courtesy. *Hoyt v. Thompson's Exr.*, 5 N. Y. 320; s. c., 19 N. Y. 225; *Willits v. Waite*, 25 N. Y. 584; *Edgerly v. Bush*, 81 N. Y. 204; Story Conf. of Laws, § 413; 2 Kent Com. 406; *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 450.

In *Willits v. Waite*, the court said: "The question then is one of comity to be settled by the decisions of the courts of this State as determining how far they will recognize a foreign involuntary bankruptcy proceeding.

The court, in *Hoyt v. Thompson's Exr.*, 5 N. Y. 320, said, RUGGLES, C. J., writing the opinion: "It is a conceded principle that the laws of a State have no force *proprio vigore* beyond its territorial limits. But the laws of one State are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice where neither that State nor its citizens will suffer any inconvenience from the application of the foreign law."

Most of the authorities enunciate the doctrine that where the rights of creditors are not concerned the courts of a foreign jurisdiction should permit the assignee or receiver or other legal representative of the debtor to take possession of the debtor's property in that jurisdiction, or sue for it if necessary. The following cases sustain the doctrine that an assignee may sue in a foreign jurisdiction where the interests of creditors are not involved. *Hibernia Nat. Bank v. Lacombe*, 21 Hun, 175; *Holmes v. Remsen*, 20 Johns. 259; *Hoyt v. Thompson*, 5 N. Y. 351; *Willits v. Waite*, 25 N. Y. 484; *Hunt v. Jackson*, 5 Blatchf. 349; Story Conf. Laws, § 420; *Milne v. Moreton*, 6 Binn. 363-374; *Upton v. Hubbard*, 28 Conn. 274.

And a receiver has been declared competent to maintain an action in the courts of a State other than that in which he was appointed in the following cases: *Lycoming Insurance Co. v. Wright*, 55 Vt. 526; *Hurd v. City of Elizabeth*, 41 N. J. L. 1; *Bagby v. Atlantic, etc., R. Co.*, 86 Penn. St. 291; *Runk v. St. John*, 29 Barb. 285; *Cagill v. Wooldridge*, 8 Baxt. 580; s. c., 35 Am. Rep. 716; *Graydon v. Church*, 7 Mich. 86; *Iglehart v. Bierce*, 36 Ill. 133; *Wilmer v. Atlantic & R. A. L. Co.*, 2 Woods, 418; *Merchants' Nat. Bank v. McLeod*, 33 Ohio St. 174.

A very respectable authority seems to carry the doctrine of the recognition of a transfer under a foreign law so far as to hold that in all cases where the rights of domestic creditors are not concerned, the transfer will be given the same force and effect as in the State under whose statute it was made. *Bagby v. Atlantic, etc., R. Co.*, 86 Penn. St. 291; *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 450.

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In the first case a receiver had been appointed in the State of Virginia of the property of the defendant. At the time of such appointment there was due to the defendant from a debtor who resided in Pennsylvania a sum of money, which the receiver claimed. After the appointment of the receiver a creditor of the defendant, who resided in Virginia, where the receiver was appointed, went to Pennsylvania and there instituted a suit against the defendant, in which the debt referred to was attached. The Supreme Court held that the claim of the receiver must prevail over the claim of the attaching creditor. This case however cannot be considered an authority in favor of the doctrine that the title of the transferee in proceedings against an insolvent debtor to property in a foreign jurisdiction will be recognized in such foreign jurisdiction where such recognition will not prejudice the rights of creditors who reside in such foreign jurisdiction. The debt which the creditor of the defendant sought to attach in Pennsylvania and hold as against the receiver never had any *situs* in that State. The defendant to which the debt was owing was a corporation organized under the laws of Virginia; and it is a principle so elementary as to require no citation of authority to support it, that the residence of the creditor determined the legal *situs* of a debt. There was therefore nothing in Pennsylvania to attach. The debt was not there, and moreover the law of the State where it was legally located had already effectually transferred it.

It may therefore be said to be the uniform rule that where the rights of creditors are involved the transfer under a foreign law can have no operation whether the creditors who claim in opposition to it are domestic or foreign creditors. Such is clearly the rule established by the cases of *Hibernia Nat. Bank v. Lacombe*, 21 Hun, 166; s. c., 84 N. Y. 367; s. c., 38 Am. Rep. 518; *Johnson v. Hunt*, 28 Wend. 91; *Hoyt v. Thompson*, 5 N. Y. 351; *Willits v. Waite*, 25 N. Y. 584; *Upton v. Hubbard*, 28 Conn. 274; *Rhawn v. Pearce*, 110 Ill. 350; s. c., 51 Am. Rep. 691; *Warren v. Union Nat. Bank*, 7 Phila. 156. The above cases all hold that the transfer is invalid even as against foreign creditors. (Of course such transfer is void as against creditors of the jurisdiction where the property is situated.)

The case of *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; s. c., 38 Am. Rep. 518, is an express authority. Plaintiff commenced in the State of New York an action against the Mechanics and Traders' Bank, a Louisiana corporation, on a draft, and attached moneys of that corporation on deposit in this State. Plaintiff was a corporation organized under the laws of the State of Louisiana. Before the attachment was levied the Mechanics and Traders' Bank went into liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets. They were made parties to the suit, and claimed that as to them the attachment was a nullity, on the ground that their appointment antedated the levying of the attachment, and that the plaintiffs could not claim that the laws of Louisiana, under which the property of the Mechanics and Traders' Bank was vested in them, were in operation in the State of New York, because it was itself a resident of the State of Louisiana. But the Court of Appeals refused to be governed by this argument, and decided that the foreign commissioners obtained

no better title as against the foreign creditor than they would have obtained against a domestic creditor. The court said: "The remaining question relates to the claim made by Messrs. Lacombe and others, commissioners appointed by the court in Louisiana. Neither the law nor the adjudication under which they were appointed can have any operation here. They are strictly local, and affect nothing more than they can reach. For the rule, as we conceive, is well settled that an assignment by virtue of or under a foreign law does not operate upon a debt or right of action as against a person in the State. The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit—a formality, and not matter of substance; a mere delusion. Once properly in court, and accepted as a suitor, neither the law nor the court administering the law will admit any distinction between a citizen of its own State and that of another. Before the law and its tribunals there can be no preference of one over the other."

In *Johnson v. Hunt*, 23 Wend. 91, the court, after referring to the case of *Abraham v. Plestoro*, 3 Wend. 548, said: "The amount of the decision, as I understand it, is that an assignment in *inotum* under the law of one State or nation has no operation in another, even with respect to its own citizens; that the bankrupt, the subject of the very country under whose laws he was proceeded against, may on crossing the territorial line dispose of the property which he has brought with him, may withhold it entirely from the creditors who are proceeding against him in the foreign jurisdiction; and it follows that other creditors, coming into the same jurisdiction, may either pursue him by attachment, by judgment and execution, or take a voluntary transfer of the property so brought by the debtor in satisfaction of his claim."

In *Hoyt v. Thompson*, both of these cases were reviewed by PAIGM, J., who declared that they established "the absolute invalidity of the foreign statutory assignment as it respects property in this State, not only as between the foreign assignees and domestic creditors, but also as between such assignees and creditors residing in the country under whose laws the assignment was made, and who are proceeding against the property by attachment or otherwise in our courts."

And in *Willits v. Waite*, the court said: "I understand that in this case" (*Abraham v. Plestoro*) "the court held that such title will not be recognized by the courts of the State, even where the question arises entirely between the bankrupt and his assignees and creditors all residing in the country under whose laws the assignment was made."

In *City Ins. Co. v. Commercial Bank*, 68 Ill. 348, the attaching creditor was a resident of the State of Rhode Island, in which the insolvency proceedings were instituted; and yet the Illinois Supreme Court held that the attachment of property of the debtor in that State was valid as against the prior transfer of the debtor's property under the laws of Rhode Island.

To the same effect is *Boston Iron Co. v. Boston Loco. Works*, 51 Me. 585; and in the case of *Warren v. Union Nat. Bank*, 7 Phila. 156, it appeared that a

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citizen of Kentucky had attached the moneys of B., a citizen of Tennessee, in the hands of C., a citizen of Pennsylvania. Before the issuing of the attachment a receiver had been appointed in Tennessee of the property of B., and the receiver claimed the money. But the court held that the attaching creditor was entitled to priority, even though he was not a resident of that State. With reference to voluntary assignments, the rule is well established that the conveyance, if valid, where made, is operative to transfer personal property of the assignor, wherever located. This general principle is so elementary that it will be unnecessary to cite authorities in support of it. The question of the validity of an assignment for the benefit of creditors frequently arises between the assignee and the creditors of the assignor who reside in a foreign jurisdiction, and who are there pursuing the personal property of the assignor situated in that jurisdiction. With an exception that will be referred to subsequently, the cases all hold that the assignment, if valid by the laws of the place where it is made, and prior in time to the attachment or execution or other process of the domestic creditor, it will take precedence over the claim of such creditor. *Caskie v. Webster*, 2 Wall. Jr. 181; *Speed v. May*, 17 Penn. St. 91; *Moore v. Willett*, 35 Barb. 663; *Law v. Mills*, 18 Penn. St. 185; *Bholen v. Cleveland*, 5 Mason, 174; *Hoyt v. Thompson's Exr.*, 19 N. Y. 207; *Greene v. Mowry*, 2 Bailey (S. C.), 163; *Forbes v. Scannell*, 13 Cal. 242; *Smith v. Chicago & N. W. R. Co.*, 23 Wis. 267; *Gregg v. Sloan*, 76 Va. 497; *Atherton v. Ives*, 20 Fed. Rep. 394 (Ky.); *Walters v. Whitlock*, 9 Fla. 87-108; *Miller v. Kernaghan*, 56 Ga. 155; *Whipple v. Thayer*, 16 Pick. 25; *Burlock v. Taylor*, 16 Pick. 335; *Daniels v. Williard*, 16 Pick. 36; *Atwood v. Protection Ins. Co.*, 14 Conn. 555; *Sanderson v. Bradford*, 10 N. H. 260; *Ockerman v. Cross*, 54 N. Y. 29; *Hanford v. Paine*, 32 Vt. 442; *Johnson v. Sharp*, 31 Ohio St. 611; s. c., 27 Am. Rep. 529; *May v. Wannemacher*, 111 Mass. 202; *Asken v. La Cygne Exchange Bank*, 33 Mo. 366; s. c., 53 Am. Rep. 590.

The exception to the foregoing rules is in favor of domestic creditors where the foreign assignment is repugnant to the policy or laws of the State in which domestic creditors have attached property located therein. Practically all of the authorities recognize and adopt it. *Green v. Van Buskirk*, 7 Wall. 139; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664; *Varnum v. Camp*, 1 Green (N. J.), 326; *Moore v. Bonnell*, 31 N. J. L. 90-94; *Bentley v. Whittemore*, 19 N. J. Eq. 462; *Bryan v. Brisbin*, 26 Mo. 423; *Philson v. Barnes*, 50 Penn. St. 230; *Guillander v. Howell*, 35 N. Y. 667; *Mumford v. Cuntz*, 50 Ill. 370; *Zipcey v. Thompson*, 1 Gray, 243; *Boyd v. Rockport Mills*, 7 Gray, 406; *Stricker v. Tinkham*, 35 Ga. 177; *U. S. v. U. S. Bank*, 8 Rob. (La.) 262; *Southern Bank v. Wood*, 14 La. Ann. 554; *Fuller v. Steiglitz*, 27 Ohio St. 355, s. c., 22 Am. Rep. 312; *Rice v. Courtis*, 32 Vt. 460; *Pierce v. O'Brien*, 129 Mass. 314; s. c., 37 Am. Rep. 360; *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 450. See also *Edgerly v. Bush*, 31 N. Y. 199-206.

There are cases however which more or less militate against this doctrine. *Baltimore Ohio R. v. Glenn*, 28 Md. 287; *Livermore v. Jenckes*, 21 How. 126; *Moore v. Willett*, 35 Barb. 663.

The cases of *Caskie v. Webster*, 2 Wall. Jr. 181, and *Speed v. May*, 17 Penn. St. 91, also seem to be opposed to the rule, but on examination their opposition

will be seen to be more apparent than real. In *Caskie v. Webster*, a resident of Virginia made an assignment there which was good by the laws of that State. At the time of the assignment a citizen of Pennsylvania owed a debt to the assignor. Subsequently to the assignment this debt was attached in Pennsylvania by a creditor of the assignor who was a resident of that State. The title of the assignee was held to prevail, notwithstanding the fact that the assignment would have been invalid had it been executed in Pennsylvania. Now if the debt owing to the assignor could be said to have any *situs* in Pennsylvania, then the decision would clearly be opposed to the rule which has already been stated. But the debt did not have any *situs* in that State. Its *situs* was in the State of Virginia, where the creditor resided, as we have seen before. Of course it is competent for a State by express legislative enactment to provide for the attachment of a debt in the hands of the resident debtor, even though the creditor be a non-resident, and to declare that such an attachment shall prevail over any assignment or transfer in the State of the creditor; but until a statute to that effect has been enacted, the universal rule of international law must obtain that the debt has its *situs* in only the jurisdiction in which the creditor resides.

In *Caskie v. Webster* therefore the attaching creditor could not invoke the principle that the assignment which contravened the law of Pennsylvania was void as to him, a resident creditor, for the very obvious reason that the property which he sought to attach (i. e., the debt) was neither actually nor legally within the territorial limits of that State, and therefore not within the control of the courts of that State.

The facts in the case of *Speed v. May* were similar. The property attached was a debt owing to the assignor. The assignment, valid in the State of his residence, was therefore effectual to pass it as against the world, because it was neither actually nor legally within the jurisdiction and control of any other State.

PECKHAM, J., in *Guillander v. Howell*, 85 N. Y. 657, recognizes this distinction between a debt and other personal property, and *Speed v. May*, and *Caskie v. Webster*, were declared in that case to be correctly decided upon that distinction, the court saying: "A chose in action cannot be said to have any actual *situs* in the place where the debtor resides. As a general principle, it is payable at the residence of the creditor if not otherwise expressed, and a tender, to be good, must be made to the creditor. There would seem therefore to be no sound basis for the debtor's State to legislate exclusively as to the legality of the transfer of that debt made by a foreign creditor. In such cases, as in all others where the property transferred does not lie within the jurisdiction of another government, a sale or contract valid where made is valid everywhere." See also *Howard Nat. Bank v. King*, 10 Abb. N. C. 346; *Osgood v. Maguire*, 61 N. Y. 524; *Williams v. Ingersoll*, 89 N. Y. 508, 523, 524.

The case of *Phileon v. Barnes*, 50 Penn. St. 230, does not militate against this doctrine. The assignment was not recorded before the attachment and the Pennsylvania statute expressly declared that a foreign assignment should not be valid as against a creditor, who should obtain a lien on property in that State without notice of the assignment before the assignment should be recovered.

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Creditors could unquestionably attach a debt in the hands of a debtor in that State, even though the debt had no actual or legal *situs* there. This is the invariable rule. It becomes necessary to determine whether this rule can be invoked when there arises a conflict between the attaching creditor and a claim to the debt springing from the act of the creditor in some foreign jurisdiction. In all other cases it is of universal application. That it can be invoked in such case is clear. The debt can always be attached in the domicile of the debt, for every State has the undoubted right to declare that the payment of money due from one of her own citizens shall be made to one to whom such debtor is indebted. This result is accomplished by means of an attachment. It is therefore within the power of the State to control such debt by permitting it to be attached. The Pennsylvania court started out therefore with the settled principle that the debtor could attach the debt in the hands of the debtor in that State; and the only question that was to be determined under the facts was whether the title of an assignee under a foreign assignment, prior in point of time to the attachment, should prevail over the attachment. The court very properly decided that the statute referred to indicated an intent on the part of the legislature to give priority, as against an unrecorded foreign assignment, to an attachment upon any property of the assignor that could be attached in that State, whether it had any actual or legal *situs* there or not. The writer is not giving the reasoning of the court in that case, but is merely stating the true ground upon which the decision ought to rest. The case cannot be considered an authority against the doctrine that an assignment of a debt is paramount to a subsequent attachment of it in the jurisdiction of the person who owes the debt, because the assignment was not recovered in Pennsylvania before the attachment, and the legislature had expressly ordained that an unrecorded foreign assignment should not take precedence over an attachment of any property that could be effectually attached in that State.

But the case of *Paine v. Lester*, 44 Conn. 196; s. c., 26 Am. Rep. 492, is certainly opposed to this rule, which we have seen is sustained by the weight of authority. In that case the court held not only that a subsequent attachment by a domestic creditor of a debt in the State in which the person owing the debt resided would prevail over a prior assignment of it in the jurisdiction in which the person to whom the debt was owing resided, but that a non-resident attaching creditor was entitled to such priority. Of course the assignment was not valid by the laws of the State where the debt was attached, although it was valid in the State where it was executed.

A Pennsylvania corporation made in that State an assignment for the benefit of creditors, which was valid there but invalid in Connecticut. A citizen of Connecticut at the time of the assignment was indebted to the corporation, and after the assignment a creditor of the corporation, who resided in Rhode Island, attached the debt in Connecticut, and the Supreme Court of that State decided that his lien was superior to the title of the assignee. But where the rights of foreign attaching creditors are concerned it is of no importance whether the voluntary assignment would have been void or valid in the State in which such creditors seize the assignor's personal property, had it been executed therein. In either case the assignment stands first. If therefore subsequently to

the assignment a creditor from some State other than that in which the property is located attaches the property, the assignment will have preference even though it would have been void under the laws of the State in which the property is attached had it been then executed, provided of course it is valid by the laws of the State where it is made. *Thurston v. Rosenfeld*, 49 Mo. 474; *Bentley v. Whittemore*, 19 N. J. Eq. 463; *Whipple v. Thayer*, 16 Pick. 25; *Atwood v. Protection Ins. Co.*, 14 Conn. 555; *Sanderson v. Bradford*, 10 N. H. 260; *Hall v. Boardman*, 14 N. H. 38; *Burlock v. Taylor*, 16 Pick. 335; *Chafee v. National Bank*, 71 Me. 514; s. c., 36 Am. Rep. 345; *Receiver of State Bank v. First Nat. Bank*, 34 N. J. Eq. 450.

In *Bentley v. Whittemore*, the assignment was made in New York by a citizen of that State. A portion of his property was in New Jersey. A creditor who was not a resident of New Jersey sought to assail the assignment on the ground that it was repugnant to the laws of that State. The court said: "Upon what principle can a citizen of another State ask us to refuse to recognize the validity of an assignment made in the State of New York and in conformity to her laws? Upon what pleas consistent with comity under such circumstances are the authorities of this government to repudiate a transaction valid by the laws of a sister State? If the question touched one of our own citizens we could vindicate our rejection of such transaction on the ground of our statute passed legitimately for the regulation of the affairs of such citizens. But if such rejection relates to the citizens of another State, how is such a line of conduct to be justified? We might indeed urge as a sort of excuse that the laws of New York regulating assignments were not similar to the laws of this State, and that we preferred the regulations of our law. * * * But I cannot think we have a right to endeavor to arbitrate in such a concern. * * * The true rule of law and public policy is this: That a voluntary assignment made abroad, inconsistent in substantial respects with our statutes, should not be put in execution here to the detriment of our own citizens, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect.

The case of *Warner v. Jaffray*, 96 N. Y. 248; s. c., 48 Am. Rep. 616, is not in conflict with these adjudications. The assignment was made in New York, and a creditor who was a citizen of that State attached property of the assignor in Pennsylvania after the execution of the assignment, but before it had been recorded in Pennsylvania. Had the assignment been merely repugnant to the laws or policy of that State the court would have been compelled under the rule already referred to to give the assignee priority over the attaching creditor; but the case was not merely the case of an assignment which would have been void if executed in the State where the property was attached. The Pennsylvania statute expressly provided that a foreign assignment not recorded in that State should be void as against a subsequent attaching creditor without notice of the assignment, and no distinction was made between the case of a foreign and a domestic creditor. The ruling of the court was therefore not to be governed by the doctrine laid down in the cases last above cited, because the legislature had ordained a different rule which to that extent abrogated the existing common-law rule. The case of *Green v. Van Buskirk*, 7 Wall. 189, was decided on the same ground. A., a citizen of New York, was indebted to B., a resi-

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dent of the same State, and mortgaged to him certain personal property in the State of Illinois. C., to whom A. was also indebted, and who was also a resident of New York, attached the personal property in Illinois after the execution of the mortgage, but before the mortgage had been recorded, and before the property had been delivered to B., the mortgagee. By the laws of New York the mortgage was valid, but under the Illinois statute both recording and delivery of the property were indispensable to the validity of the mortgage. B., the mortgagee, sued C., the attaching creditor, in the New York court for conversion. On appeal, the United States Supreme Court, reversing the judgment of the New York Court of Appeals, held that the mortgage was void as against an attaching creditor in Illinois, because the statute so expressly declared.

While it is firmly established that a creditor residing in the same State as his debtor may go into a foreign jurisdiction and there seize the personal property of such debtor, and thereby secure a lien which will have precedence over the title of the receiver or assignee appointed in proceedings *in invitum*, it is by no means certain that such creditor will ultimately gain any advantage over other creditors who are citizens of the same State. Although the rule cannot be regarded as definitely settled, yet the leaning of the courts is toward the equitable doctrine that such creditor will, when he returns to the domicile of the debtor, be held there by the assignee or receiver as trustee, to the extent that he has collected his claim out of the property in a foreign jurisdiction. *Hibernia Bank v. Lacombe*, 21 Hun, 166; a. c., on appeal, 84 N. Y. 372; a. c., 38 Am. Rep. 518; Story Conf. Laws, § 409; a. c., 48 Am. Rep. 616; *Hunter v. Potts*, 4 T. R. 182; *Sill v. Wornwick*, 1 H. B. L. 665.

In *Hibernia Bank v. Mechanics' Bank*, the court at General Term said: "In England, a British creditor who thus seeks to defeat the law of equality is treated as a trustee, and in an action by the assignee may be compelled to refund what he secured by attachment in foreign parts; or he may be restrained by injunction from proceeding against the estate of the insolvent in the foreign jurisdiction." And in the Court of Appeals the court in the same case referred to this doctrine without either approval or disapproval: "If the plaintiff has by its proceedings obtained an advantage against the law and adjudications of Louisiana, it is a resident of that State, and as such, the appellant's counsel contends, may there be overhauled and made to account for what it has gained here. To that remedy, if it exist, the defendant may properly be remitted." Story says that a British creditor will not be permitted to hold the property acquired under an attachment in a foreign country after the institution of bankruptcy proceedings. Conf. Laws, § 409. Whether the English doctrine will be adopted in this country it is impossible to say, but a decided preponderance of authority there on the subject is certainly in favor of that doctrine.

The case of *Vermont & C. R. Co. v. Vermont C. R. Co.*, 46 Vt. 792, is in harmony with it. It was there decided that the courts of Vermont will restrain parties within their jurisdiction from prosecuting suits in foreign courts to reach property in a foreign jurisdiction owned by a corporation over which the courts of Vermont have appointed a receiver. The principle which underlies this decision is that a creditor who resides in the same State as the debtor

shall not secure any advantage over the creditors of the same State by a seizure of the debtor's property in a foreign jurisdiction. If the courts of the State where he is domiciled will not suffer him to gain such advantage by a seizure, but will restrain and prevent such seizure, will they not also compel him to disgorge whatever he recovers in a foreign jurisdiction, and in this manner prevent his obtaining such an advantage? On principle there can be only one answer to the inquiry, and that is in the affirmative.

But the case of *Warner v. Jaffray*, 96 N. Y. 248; s. c., 48 Am. Rep. 616, seems to be opposed to this principle. In this case the assignee, under an assignment made in the State of New York, sought to enjoin the defendants from proceeding to enforce an attachment which they had levied on property of the assignor, in the State of Pennsylvania, and which was paramount to the title of the assignee to such property in that State. The defendants, who were plaintiffs in the attachment suit, resided in the State of New York, where the assignor also resided. The question was thus squarely presented whether the New York creditors should be allowed to secure any advantage over other New York creditors who were represented by the assignee by proceeding in a foreign jurisdiction against the property of the debtor there found.

The New York Court of Appeals held that they should, the court saying: "There is no law which forbids these defendants going into the State of Pennsylvania to collect their claims there of their debtor. In going there they did no wrong to any one, and did not violate the legal or equitable rights of any one. The laws of this State did not follow them into that State, and they had the same right to enforce payment of their claims out of the property of the assignor found there, and as to them belonging to him, as any resident creditor had. A foreign creditor has the same rights here against the property of his non-resident debtor as a resident creditor has, and so we held in *Hibernia Bank v. Lacombe*, *supra*.

"In that case DANFORTH, J., said: 'Once properly in court, and accepted as a suitor, neither the law nor the court administering the law will admit any distinction between the citizen of its own State and that of another. Before the law and its tribunals there can be no preference of one over the other.' * * * The defendants cannot be treated as tortfeasors here for acts perfectly lawful where they were committed. If a judgment in Pennsylvania would have protected them, then the attachments will protect them, and there are no principles of law or equity which authorize any court in this State to restrain them from proceeding in an orderly and lawful way to reap the fruits of their vigilance."

A recent case in the New York Court of Appeals has settled certain doctrines in that State. It is the case of the *Matter of Waite*, 99 N. Y. 433. The question presented was as to the right of an assignee in bankruptcy appointed in England, under the bankrupt laws of that country, to sue in the State of New York. The facts under which the question arose were as follows: H. & S. made a general assignment to W., of the firm of P. & W. The firm of P. & W. were preferred. Subsequently P. & W. were adjudged bankrupts under the English bankrupt law, and one Schofield appointed assignee, P. being a resident of London, and W. having submitted himself to the jurisdiction of

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the English bankrupt court. W., as assignee of H. & S., retained in his own hands, as member of the firm of P. & W., the sum of \$14,833.70 out of the moneys in his hands as assignee of the firm of H. & S. Schofield, on the accounting of W., as such assignee, appeared and claimed that W., as such assignee, must pay the amount to him, Schofield, as assignee in bankruptcy of the firm of P. & W., on the ground that the foreign bankruptcy proceedings had transferred the title of the firm of P. W. to that money to Schofield, their assignee. The issue of law was thus squarely presented as to the effect in the State of New York of the English bankrupt laws, and proceedings instituted under them. It was conceded that the rights of creditors in New York, either domestic or foreign, were in no manner involved. The court sustained the title of the assignee to the money, and held that he might recover it of W. The court said: "We have not a case here where there is a conflict between the foreign trustee and domestic creditors. So far as appears, no injustice whatever will be done to any of our own citizens, or to any one else, by allowing the transfer to have full effect here. Indeed, justice seems to require that this money should be paid to the foreign trustee for distribution among the foreign creditors of the bankrupts. The effect to be given in any country to statutory *in iudicio* transfers of property through bankruptcy proceedings in a foreign country has been a subject of much discussion among publicists and judges, and unanimity of opinion has not been, and probably never will be reached.

"We shall not enter much into the discussion of the subject, and thus travel over ground so much marked by the footsteps of learned jurists. Our main endeavor will be to ascertain what, by the decisions of the courts of this State, has become the law here. * * * From all these cases the following rules are to be deemed thoroughly recognized and established in this State: (1) The statutes of foreign States can in no case have any force or effect in this State *ex proprio vigore*, and hence the statutory title of foreign assignees in bankruptcy can have no recognition here solely by virtue of the foreign statute; (2) but the comity of nations, which Judge DENIO, in *Peterson v. Chemical Bank*, said is a part of the common law, allows a certain effect here to titles derived under the powers created by the laws of other countries, and from such comity the titles of foreign statutory assignees are recognized and enforced here when they can be, without injustice to our own citizens and without prejudice to the rights of creditors pursuing their remedies here under our statutes; provided also that such titles are not in conflict with the laws or the public policy of our State; (3) such foreign assignees can appear, and subject to the condition above mentioned, maintain suits in our courts against debtors of the bankrupt whom they represent, and against others who have interfered with or withheld the property of the bankrupt."

A brief statement of the English law on the subject of involuntary transfers of property will not be out of place. It is diametrically opposed to the law in this country. The following rules are well established in Great Britain: (1) That an involuntary transfer under her bankrupt laws is operative in every jurisdiction, not only as against foreign, but also as against domestic creditors of the bankrupt. Story Conf. Laws, § 409. While this rule can have no

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force so far as foreign creditors are concerned in all countries where the English rule does not prevail; yet subjects of Great Britain are uniformly held to be bound by it, and have been compelled to account in the English courts for property received in foreign countries in opposition to it, and there are several cases where the creditor was restrained from attaching the bankrupt's property in a foreign jurisdiction. In *Hunter v. Potts*, 4 T. R. 182, and *Sill v. Worwick*, 1 H. Bl. 665, the British creditor who had attached the bankrupt's property in a foreign country was compelled to account to the assignee. To same effect, *Philips v. Hunter*, 2 H. Bl. 402.

(2) On the other hand, an assignment in bankruptcy under foreign laws will be held to pass the title to the bankrupt's property in England, even as against a subsequent seizure of the property by an English creditor. Story Conf. Laws, § 409; *Jollet v. Deponthieu*, 1 H. Bl. 182, note; *Solomons v. Ross*, 1 H. Bl. 131, note. The same doctrine has been established in Scotland (*Stein's case*, 1 Rose Cas. Bankr. 462; *Selkraig v. Davies*, 2 Dow. 230; and in Ireland, *Neal v. Cottingham*, 1 H. B. L. 182, note.) But it has received this qualification in the English courts, that the title of the foreign assignee will be held to be paramount in only those cases in which it appears that in the domicile of the debtor there is a bankrupt law in form or in substance. Story Conf. Laws, § 415.

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(33 Conn. 407.)

Criminal law — delivering intoxicating liquor to minor.

A statute forbidding the sale or delivery of intoxicating liquor to any minor, does not apply to a minor sent by his father to buy liquor for him.

CONVICTION of selling and delivering intoxicating liquor to a minor. The opinion states the case.

J. L. Barbour, for appellant.

W. Hamersly, States' attorney, for State.

GRANGER, J. This is a prosecution against a person licensed to sell intoxicating liquors, for the sale and delivery of such liquors to a minor in violation of the act of 1882, which provides that "every licensed person who shall sell or deliver intoxicating liquor to any minor," shall be fined, etc. Session Laws of 1882, chap. 107, part 6, § 4, p. 186. And the case depends upon the construction to be given to that act.

State v. McMahon.

The statute is a penal one and is to be strictly and fairly construed and not to be extended beyond cases clearly within both its letter and spirit. This rule is well settled. "A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers." 4 Bac. Abr., Statutes, § 45. Penal statutes are always to be strictly construed for the benefit of the citizen; nothing more is to be deduced from the words than they expressly warrant, and they are not to be extended by implication." 1 Swift Dig. 13; 1 Black. Com. 61. In *French v. Gray*, 2 Conn. 113, HOSMER, J., says: "Instances of restrictive legislation, narrowing the liberal operation of a statute, have been frequent; and criminal laws of the most comprehensive expression are not considered as including idiots or mad-men. * * * By 1 Edw. II. the breaking of a prison by a prisoner confined for felony is made a felony; but if the prison is on fire, and in order to save his life the prisoner breaks it, this act, though directly contrary to the latter, is deemed to be no violation of the statute. Plowd. Rep. 13."

In prosecutions under the same statute that we are now considering, for keeping open places where liquors are sold on Sunday, we have recently held, in *State v. Ryan*, 50 Conn. 411, that a literal keeping open of such a place for the ordinary use of the family and boarders of the keeper, was not a violation of the statute.

Applying the rule we have stated a majority of the court are of opinion that the facts of this case do not bring it within the intent and spirit of the act, although it may come within its letter, and that there has not been a violation of the statute.

The facts show no purpose on the part of the defendant to practice any subterfuge or attempt to evade the law. Nor do they show in themselves any dishonest purpose. If any offense was committed it consisted solely in the handing of the bottle containing the liquor to the child, for unquestionably, the sale was in law to the father, the child having disclosed her agency and stated the errand upon which she was sent by her father. The sale to the father was a legal sale, the defendant being a licensed vendor, unless the act of passing the bottle into the hands of the child made it illegal. It does not seem reasonable to suppose that it was the intention of the legislature to make an act, innocent as this was in itself, a crime, when no injury to the child could result; for the bottle of liquor, so long as it was not opened, was as harmless as a package of tea, or any other article that children are so frequently and so properly sent to purchase.

The intention of the provision in question in the statute was, as it seems to us, solely to prevent a licensed vendor of liquors from selling to minors, and the other classes mentioned in the act, liquors for their own use. The mischief to be remedied was the obtaining of liquors by those classes for their own indulgence. The seller was not to furnish them liquors for this purpose by sale or gift or delivery. The word "delivery," as here used, is of the same import as the word "give." Both these words are used in the act with apparently the same intent, or substantially the same. In the third section, in case of notice by the selectmen to the dealer, he is forbidden to "sell, exchange or give." In section four, which states the penalty, the words "give" and "exchange" are omitted and the words "sell or deliver" only used. Webster defines the word "deliver"—"to give or transfer." In this case it seems clear that the words "sell or deliver" mean simply that the dealer shall transfer the liquor to the interdicted persons by sale or gift.

"A statute ought to be so construed that no man who is innocent can be punished or endangered." 4 Bac. Abr., Statutes. "No statute should be construed in such manner as to be inconvenient or against reason." Carthew, 136; 1 Inst. 97.

A recent decision of the Supreme Court of Massachusetts, in a case almost identical with the present one, both as to the statute construed and as to the facts, sustains the view we have taken. *Commonwealth v. Lattinville*, 120 Mass. 385.

There is error in the ruling of the Superior Court and a new trial is ordered.

New trial ordered.

In this opinion PARK, C. J., and PARDEE, J., concurred; LOOMIS, J., dissented; CARPENTER, J., did not sit.

Gould v. Banks.

GOULD V. BANKS.

(58 Conn. 415.)

Copyright — in judicial opinions.

A State has copyright in the judicial opinions of its judges. (*See note, p. 144.*)

APPPLICATION for an order that the State reporter furnish copies of the judicial opinions for publication. The opinion states the point.

L. E. Stanton and H. S. Stearns, for appellants.

O. E. Gross, opposed.

PARDEE, J. For the information of the public the State of Connecticut publishes reports of cases argued and determined in the Supreme Court of Errors. The volume is prepared for publication by the official reporter, and contains the opinions written by the judges, together with head-notes to all cases, foot-notes to some of them, statements of facts, a table of cases, and an index to subjects, the work of the reporter. The judges and the reporter are paid by the State, and the product of their mental labor is the property of the State, and the State, as it might lawfully do, has taken to itself the copyright. The statute requires the comptroller to supervise the publication of the volumes, taking a copyright for the benefit of the State. Under this statute that officer, for a valuable consideration, granted to Banks & Brothers, who agree to print and sell the reports at a fixed price, the protection of the copyright for a limited period. During three or four years the State, with knowledge, has acquiesced in the terms of this contract and accepted the resulting benefits. If therefore we should now direct the reporter to furnish copies of opinions to the petitioners, that they may sell them to the public in advance for their own profit, we should in effect advise the State to a breach of contract.

It is for the State to say when and in what manner it will publish these volumes; and the taking of the copyright in no sense offends the rule that judicial proceedings shall be public. The courts and their records are open to all. The reasons given by the

Supreme Court of Errors for its determination in a given cause constitute no part of the record therein; the judgment stands independently of these. Moreover, these are accessible to all who desire to use them in the enforcement of their rights.

The application for an order that the reporter furnish copies of all opinions to the petitioners is denied.

Application denied.

In this opinion the other judges concurred.

NOTE BY THE REPORTER.—The precise question of the copyright of a State in the judicial opinions of its judges has never before been adjudicated, although it has been frequently hinted that no such copyright exists. The question of the copyright of reporters in head-notes and statements has several times been passed upon, and in several recent cases the question has arisen whether by statute the legislature has essayed to invest particular publishers with copyright. Mr. Drone in his work on Copyright takes the ground declared in the principal case.

The argument of Mr Robert R. Bishop, before Judge DEVENS, of the Massachusetts Supreme Court, in *Nash v. Lathrop*, on the question whether the State had vested the exclusive right of publication of the judicial opinions of that court in Little, Brown & Co., will be of general interest. The contract in question provided that the reporter shall not "furnish for publication any reports of said decisions." The clauses of the statute relied on to justify this language are the following: "During the term of the contract herein provided for, the reporter shall not be required or allowed to publish the reports thereof," and "the stereotype plates and copyright of the volumes published under said contract shall be the property of said firm." Mr. Bishop said: "The intention of the first of these clauses we say is very obvious. Up to this time, during the entire period of the reporting of the decisions of this court up to 1879, the reporter had been both allowed and required to publish the reports; now this right and duty were both cut off. By this statute, the right of property in the volume was to be transferred to Little, Brown & Co., and the reporter was to cease to have any right of property in them; and therefore the statute provides that he 'shall not be required or allowed to publish' them; but it does not extend one whit further than that, and imposes no duty upon the reporter, nor does it authorize any contract imposing a duty upon him, to refuse access to the opinions of this court to the public, or to any individual, whether desired for purposes of publication or otherwise. We may also say that the phrase at the end of the section, that the stereotype plates and copyright of the volumes published shall belong to Little & Brown, gives no new rights. It is begging the question to say that that phrase covers the opinions as well as the remainder of the contents of the volume, because the very question is whether it does, and the clear current of authority in leading and well decided cases is the other way. I cite first, *Banks v. Manchester*, 23 Fed. Rep. 143. This was a case arising under the statute of Ohio, which is much stronger than our statute in favor of prohibition. The language of the Ohio

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statute is, 'During the term of the contract said contractor shall have the sole and exclusive right to publish such reports, so far as the State can convey the same.' That language is much stronger, as we think, than the language of this statute, and the question was there as here, whether there was a sole and exclusive right of publication of the opinions; and this is the view of the court: 'It is in accordance with sound public policy in a Commonwealth where every person is presumed to know the law, to regard the authoritative expositions of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them. And such publications may be of every thing which is the work of the judges, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication.' If the copyright of the volume does not cover the opinions of the court, it is entirely immaterial whether the period is two years or five years. 'It,' the copyright, 'protects only the work of the reporter; that is to say, the indexes, tables of cases, statements of points made and authorities cited by counsel. * * * The opinion goes on to consider whether it is possible for a copyright to be taken out which shall cover the opinions of the judges, alluding to the suggestion made in one case, though without any decision on the point, and also in a text-book, that inasmuch as the entire time of the judges is devoted to the work of their office, the product of their labors belongs to the Commonwealth, and a copyright might be taken out by the Commonwealth itself. The court however held that whether this is so or not, it was sufficient to say that the State of Ohio had not adopted legislation to that end. If that was the case under the Ohio statute, for a still stronger reason is it the case here. Under the language of our statute, 'the stereotype plates and copyright of the volume shall be the property of said firm,' the State certainly does not adopt legislation to the end of obtaining a copyright upon the opinions of the judges, if under the language 'during the term of the contract, said contractor shall have the sole and exclusive right to publish such reports so far as the State can convey the same,' the language of the Ohio statute, it does not. The well-known case of *Wheaton v. Peters*, 8 Pet. 581, is an authority which we desire to cite to your honor upon the question of the opinions of the judges being common public property, as well as *Myers v. Callahan*, 5 Fed. Rep. 726. * * * We say also that it would be difficult to conceive that the legislature of the Commonwealth meant by this language to put such ownership in the firm or in any individual, such right to withhold for a certain time from the public these opinions, as is contended for by the other side. Assuming that the legislature has a right to do it, which may admit of doubt—in the State of New York the Constitution prohibits it, and in Massachusetts the spirit of our Constitution is opposed to it; but assuming that the legislature has a right to do it—the legislature would do it if at all in emphatic and clear language; in such language as would admit of no question of construction. It is not to be believed, unless it is clear that the newspapers of this Commonwealth, and the periodical press, have not the right to publish, for the information and benefit of the citizens of the Commonwealth, the opinions of the judges as freely as they have a right to publish the statutes which are passed

by the legislature. The laws of the Commonwealth are embodied in part in the statutes, and in part in the opinions of the judges of the highest court, and if the legislature ever does undertake such a thing as to prohibit the publication of any part of its laws for any length of time, I submit it will be done in language which will admit of no question of construction."

The Supreme Judicial Court of Massachusetts denied the application for a *mandamus*. The court held that the statute did not confer the monopoly contended for, but they did not pass on the fundamental question of the State's copyright in the opinions. On this point they say: "The questions whether the State has an absolute property in the opinions of the justices after they are filed with the reporter; whether it has a copyright in such opinions which it can exercise itself, or assign to an individual; and whether a copyright on the volumes of the reports covers such opinions so as to prevent any person from publishing them after they have been published in the volumes of the reports — are not necessarily involved in this case. It may be decided upon a narrower question, which is whether the State has granted to Little, Brown & Company that exclusive right of the first publication of the opinions of the justices; in other words, whether it has conferred upon that firm the power of saying that the opinions shall not be made public until they are published in their reports. The decisions and opinions of the justices are the authorized expositions and interpretations of the laws, which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statute enacted by the legislature. It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statute and opinions should not be made known to the public. It is the duty to provide for promulgating them, while it has the power to pass reasonable and wholesome laws regulating the mode of promulgating them, so as to give accuracy and authority to them. We are not called upon to consider what is the extent or the limitation of this power, because we are satisfied that it was not the intention of the legislature, in the statute upon which the respondent relies, to limit the previously existing right of the citizen to have full access to the opinions, or to confer upon Little, Brown & Company the right to restrain any person from procuring copies of them, whether for their own use, or for publication in the newspapers or in law magazines or papers. The policy of the State always has been that the opinions of the justices, after they are delivered, belong to the public." The court also observe, in regard to the question of construction: "Similar questions have arisen in several cases in other jurisdictions. While such cases have not the weight of authorities, because each case depends in some measure upon the statute of the State in which it arose, differing from our statute, yet the general current of the cases supports the principles upon which our decision rests. *Banks v. Manchester*, 23 Fed.

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Rep. 145; s. c., 81 Alb. Law Jour. 242; *Myers v. Callaghan*, 20 Fed. Rep. 441; *Thass v. Sanborn*, 4 Cliff. 206; *Little v. Gould*, 2 Blatchf. 165; *Banks v. West. Pub. Co.*, 27 Fed. Rep. 50; s. c., 83 Alb. Law Jour. 408."

In *Banks v. West. Publishing Co.*, 27 Fed. Rep. 57, Judge BREWSTER, in speaking of the claim that the State has copyright in judicial opinions, said: "This claim seems to rest upon the idea that the State, as an entity independent of its citizens, or as a whole combined of all its individuals, has a property right in the laws and judicial opinions outside of and beyond that vested separately in each citizen. I conceive this to be an error. Each citizen is a ruler — a law maker — and as such has the right of access to the laws he joins in making, and to any official interpretation thereof. If the right of property enters into the question, he is a part owner, and as such cannot be deprived of equal access by his co-owners. Could a majority of a legislative assembly deprive the minority from participation in the deliberations, or a knowledge of the action of the assembly? The majority may bind the minority to the action it determines, but cannot withhold knowledge thereof. So the majority of the citizens of a State — in a larger sense, the law-makers — may determine the conduct of all, but can knowledge of what is determined be withheld? This of course is more emphatically true as to the statutes, but also true as to judicial opinions, which though not laws, are official interpretations of law. The mere judgment for or against the plaintiff of course decides the case, but that often furnishes little insight into the questions considered and determined. The opinions, at least those of the highest tribunal, are always considered as official interpretations of law, both statute and common, and as such binding upon all citizens. The same argument which supports the State's claim of property in judicial opinions supports that of property in statutes. The State pays the judges, and therefore owns the product of their official toil. The same is true as to legislators. But though such would be my views in the absence of prior adjudications, I find that the English courts generally sustain the crown's proprietary rights in judicial opinions. * * * Some of the decisions place the right upon the crown, that the crown is bound to see that correct copies of the Bible, laws, and judicial opinions are furnished the people. Others that the crown pays the judges who pronounce the opinions. Blackstone rests the right on grounds of political and public convenience. * * * In view of this consensus of opinion on the other side of the waters, of the fact that the common law is in force in this country, so far as compatible with our system of government and the condition and wants of society, and that a mere change in the locus of the governing power from the crown to the people ought not to work material change in the extent of that power, it may be that due regard for settled law forbids a decision in accord with the views I have expressed. It is worthy of remark however that on this side of the waters the proprietary right of the State in statutes or judicial opinions has never been affirmed unless in a late case in the Supreme Court of Errors of Connecticut."

In *Banks v. Manchester*, 23 Fed. Rep. 145, United States Circuit Court, Ohio, the question of copyright in judicial decisions was decided by SAGE, J. The plaintiff, contractor with the State of Ohio for the publication of volumes 41

and 42 of the State reports, sought to restrain the defendant, publisher of the *American Law Journal*, from publishing any of the decisions and opinions of the Supreme Court to be reported in those volumes. The head notes in that State are prepared by the judges. The court said: "Nowhere in the statute law relating to the publication of reports, is authority given to the reporter or to any other person to acquire a copyright in the decisions or opinions of the judges. This is significant, in view of the unanimous opinion of the Justices of the Supreme Court of the United States in *Wheaton v. Peters*, 8 Pet. 668, that no reporter has or can have any copyright in the written opinions delivered by that court. The legislation in the State of Ohio must be considered to have been enacted with reference to that opinion, and therefore to have been intended to limit the provisions above cited to the volumes of reports, and to exclude copyrights of the opinions of the judges. It is in accordance with sound public policy; in a Commonwealth, where every person is presumed to know the law, to regard the authoritative exposition of the law by the regularly constituted judicial tribunals as public property, to be published freely by any one who may choose to publish them. And such publication may be of everything which is the work of the judge, including the syllabus and the statement of the case, as well as the opinion. The copyright of the volume does not interfere with such free publication. It protects only the work of the reporter—that is to say, the indexes, the tables of cases, and the statement of points made, and authorities cited by counsel. *Wheaton v. Peters*, 8 Pet. 658; *Little v. Gould*, 2 Blatchf. 165 and 362; *Chase v. Sanborn*, 4 Cliff. 306; *Myers v. Callaghan*, 5 Fed. Rep. 726; s. c., 10 Biss. 189; *Myers v. Callaghan*, 20 Fed. Rep. 441. Counsel for complainants cite Judge DRUMMOND's dictum in *Myers v. Callaghan*, 5 Fed. Rep. 728, that 'if an adequate compensation was paid by the State to the reporter for the work done by him in preparing volumes of reports, then whatever property there was in the volumes arising from the labors of the reporter ought to belong to the State and not to him.' 'Now,' say counsel, 'in Ohio the State undertakes to pay the reporter adequate compensation, and by the statute that amount is all he can receive. He has no perquisites. The theory is that the State pays him for his labor, and that the result of his labor belongs to the State.' And counsel proceed to claim that 'this is precisely the theory upon which the State is entitled to the decisions of the judges. They are paid a stipulated price or sum for their services, and this by their consent—impliedly given when they accept the office—is in full of their services, and the result of their labors is the property of the State.' Mr. Drone, in his work on Copyright, page 161, states substantially the same view, although he says he has seen no sound, clear exposition of the law governing copyright in judicial decisions, and that it has not been expressly declared in any modern case that copyright will vest in a judicial decision. Mr. Justice STORY, one of the judges who concurred in the decision in *Wheaton v. Peters*, said (in *Gray v. Russell*, 1 Story, 21) that while it was held in that case that the opinions of the court, being published under the authority of Congress, were not the proper subject of copyright, it was as little doubted by the court that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work.

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Whether the State, through its reporter, can secure a copyright in the opinions of its judges, is however not a question arising, nor can it be decided in this case. It is sufficient to say that the State has not adopted legislation for such copyright, that the enactments providing for copyright for the volumes of reports, or of the reports, do not authorize copyrights of the opinions of the judges."

In *Myers v. Callaghan*, 20 Fed. Rep. 441, BREWER, J., said: "As a general thing there is but a small part of the report of a case which is the subject of copyright."

In the same case, 5 Fed. Rep. 726, DRUMMOND, J., said: "They are reports of the decisions of the Supreme Court of this State, to which no one can have a copyright." "Undoubtedly, it was competent for an editor to take the opinions of the Supreme Court, and possibly from the volumes of Mr. Freeman, and make an independent work."

In *Chase v. Sanborn*, 4 Cliff. 306, it was held in a State where the judges prepare the head-notes, the reporter has no copyright in the volumes.

QUINTARD V. KNOEDLER.

(53 Conn. 495.)

Statute — "conviction."

One is "convicted" who has pleaded guilty or been found guilty by a jury, although sentence has not been pronounced.

ACTION on a liquor license bond. The opinion states the case. The plaintiff had judgment below.

D. B. Lockwood, for appellants.

F. L. Holt, for appellee.

LOOMIS, J. The complaint seeks to recover the penalty named in a bond, dated May 28, 1883, given by Knoedler, one of the defendants, as a licensed liquor dealer, to secure his compliance with the provisions of the act under which his license was granted.

The breach of the bond consisted in the fact, which was established by proper evidence, that before the Superior Court for Fairfield county, at its February term, 1884, upon proper information and proceedings, Knoedler was found by the jury guilty of keeping open on Sunday a place where it was reputed that intoxicating liquors were sold contrary to the statute. After the verdict the

attorney for the State moved that the court pronounce sentence against the defendant, but it was found that he had fled, and thereupon the bond was called and forfeited, but no sentence was pronounced. No appeal or other proceedings have ever been taken to set aside the verdict or for a new trial. In this condition of things the plaintiff, as county treasurer, instituted this suit pursuant to the provisions of section 2, part 4 of the act of 1882 (Session Laws 1882, p. 181), which is as follows: "And whenever the person so licensed shall be convicted of a violation of any of the provisions of part 6 of this act, and no appeal is pending, said bond shall thereupon become forfeited, and the treasurer of said county shall in his own name institute suit upon said bond for the benefit of said county, and upon due proof of said conviction the court before which said suit is brought shall render judgment in favor of said treasurer for the entire amount of said bond, with costs."

The only defense was that no sentence was rendered pursuant to the verdict. The question was raised in two ways — by objecting to the record of the Superior Court offered in evidence by the State, and by claiming, after it was received, that no breach of the bond was shown; but the question for review is one and the same, namely, whether within the meaning of the statute there could be a conviction without a sentence or judgment by the court. The only difficulty in answering this question arises from the fact that the word "conviction" has been sometimes used by courts as including the final judgment of the court, but that such is not the ordinary and usual meaning may be demonstrated by reference to numerous authorities, which however we do not deem it necessary particularly to cite. The principles established are well summarized by Bishop in his *Treatise on Statutory Crimes*, § 348, as follows: "The word 'conviction' ordinarily signifies the finding of the jury by verdict that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is not that sentence has been pronounced, but only that the verdict has been rendered. So a plea of guilty by the defendant constitutes a conviction of him. Lord Coke distinguishes thus: 'The difference between a man attainted and convicted is that a man is said to be convict before he hath judgment; as if a man be convict by confession, verdict or recreancy. And when he hath his judgment upon the verdict, confession or recreancy, or upon outlawry or abjuration, then he is said to be attaint.' Yet the word 'conviction,'

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when it stands in such a connection with other words as to indicate a secondary or unusual meaning, sometimes denotes the final judgment of the court." See also the definition of the word as found in the law dictionaries of Jacobs, Wharton and Burrill.

In *Commonwealth v. Lockwood*, 109 Mass. 323; s. c., 12 Am. Rep. 699, the defendant was tried upon an indictment for cheating by false pretenses, and the jury rendered a verdict of guilty, but exceptions were taken to the rulings of the presiding judge and no sentence was pronounced. While the exceptions were pending, the governor, with the advice of the council, granted the defendant a pardon. But the Constitution of that State commits to the governor and council the pardoning power under this limitation: "but no charter of pardon granted by the governor, with the advice of the council, before conviction, shall avail the party pleading the same." The accused did not pursue his exceptions, but filed his charter of pardon in bar. To this the district attorney replied that the pardon was null and void under the constitutional provision referred to, in that it had been granted before conviction. The court held, in a very elaborate opinion by GRAY, J., that the term "conviction," as used in the Constitution, should be construed in its usual and ordinary sense, and that it did not include the sentence or judgment. It will be observed that the court held the verdict of guilty by the jury a conviction, notwithstanding the pendency of exceptions, which if pursued might have set the verdict aside. In our statute the pendency of an appeal is provided for. It prevents a suit on the bond. If this provision has any effect, it would seem to make the reason for the construction we have given stronger rather than weaker, inasmuch as it involves an implication that the omission of such a provision might have made the defendant liable notwithstanding an appeal. There was here not only no appeal, but no possibility of one.

If now we pass from the most approved legal definitions of the term under consideration and seek what light we may from the actual use of the same word in other statutes, we are confident that nothing can be found to militate against the definition assumed. In a large majority of instances where it is used, it manifestly refers to a finding of the party guilty by verdict or plea of guilty, and not to a sentence in addition.

Our conclusion therefore is that the verdict was a conviction, and there being no appeal or ulterior proceedings of any kind

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pending to set aside the verdict, there was a breach of the bond in suit.

There was no error in the judgment complained of.

In this opinion the other judges concurred.

BEARDSLEY V. SELECTMEN OF BRIDGEPORT.

(83 Conn. 489.)

Will—trust—charitable—certainty.

A provision by will that the whole estate should "be used at discretion by the selectmen of B. for the special benefit of the worthy, deserving, poor, white, American, Protestant, democratic widows and orphans residing in B.," is valid.

SUIT for construction of a will.

R. C. Amber, for executor.

J. A. Joyce, for selectmen of Bridgeport.

J. J. Rose, for Bridgeport Hospital.

H. S. Sanford, for Bridgeport Orphan Asylum.

J. C. Chamberlain, for widow.

L. Warner, for heirs at law.

PARDEE, J. By his will as originally made Aaron Summers gave to his wife the use of his entire estate during life or widowhood; by the codicil he gave \$1,000 to the Bridgeport Protestant Orphan Asylum and \$1,000 to the Bridgeport Hospital. The claim of the widow is, that she is to have the use for life of the entire estate and that neither of these legacies is payable until after her death. But the office of this codicil is to change what had been written before; it is the latest and controlling expression of the testator's wish. The bequests thereby made are absolute in terms; as perfectly so as is the devise of the life use to the wife in

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the will. The expressions are all free from ambiguity; all express a legal intent in legal language; and in them the rules of law require us to find the precise extent of the change intended by the testator. These legacies are therefore payable at the usual time.

Subject to the use for life by his wife and to diminution by certain legacies, the testator disposes of his estate as follows: "To be used discretionary by the acting selectmen of said Bridgeport for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut, until all is expended."

It is the claim of the heirs-at-law that this bequest is void for uncertainty as to the persons composing the class to be benefited, and they have pressed upon our attention the doubts and difficulties which will beset the trustees whenever they shall attempt to select the beneficiaries. But notwithstanding the accumulation of adjectives the bequest is within our statute of charitable uses as interpreted by this court; for it is to be borne in mind that the question before us is not—are there not many persons concerning whom there must be doubts whether they can meet some of the requirements of the testator? but it is, are there not many concerning whom no doubt can exist that they are able to meet them all? Each one of the adjectives is of common use and has as definite and precise a meaning as have most words in the language. Of course there are all grades of character and of pecuniary condition, and all shades of color; of course men may profess the Protestant faith and worship after its forms; may advocate the principles of the Democratic party and vote for its candidates, and yet at heart accept neither. But notwithstanding all this, men are constantly deciding and acting, in matters which concern both property and person, upon the belief that they will not be misunderstood when they use adjectives like these under consideration. The business of the world will not, cannot wait until every word shall become mathematically precise.

The office of selectmen is continuous by law. The persons from time to time constituting the board of selectmen of the town of Bridgeport are joint trustees in perpetual succession, clothed with power and placed under obligation to select beneficiaries from the classes specified by the testator and apply either the interest or the principal of the fund to the relief of their necessities at discretion.

The beneficiaries must be "poor." This word as used by the

testator includes those who have exhausted all means of support and are in a condition to require public aid for the supply of their necessities; certainly it includes those who as paupers are receiving such aid, and therefore beyond all question within the statute.

They must be "worthy and deserving." In *White v. Fisk*, 22 Conn. 31, the descriptive adjective was "pious;" in *Treat's Appeal from Probate*, 30 Conn. 113, this court said of the will under consideration in *White v. Fisk*, that the testator "had provided in his will no way of selecting the beneficiaries from a class, and the court held that they could not, even as a court of equity, do it for him. Had that power been given to his executors or trustees the clause in the will would have been sustained." To determine that one is "worthy and deserving," is no more difficult than to determine that he is "pious."

They must be "white." In *Treat's Appeal from Probate* just referred to, they were "Indians and Africans," and the bequest was sustained. It is as difficult to declare of a person that he has color as that he has none. For many years by the Constitution of this State only white men were permitted to vote; if the word has in the general mind a meaning so sharply defined that it can be put to a use so practical and so important, we think it may well support a charitable bequest.

They must be "American." In the general mind this adjective now describes the descendants of Europeans born in America, and is applied especially to the inhabitants of the United States, persons quite as easily distinguished as Indians and Africans.

They must be "Protestant." This adjective was defined and declared capable of sustaining a charitable bequest by this court in *Tappan's Appeal from Probate*, 52 Conn. 412.

They must be "Democratic." It is a matter of common knowledge that there is a political party known as the Democratic party, to which a large portion of the voters in every one of the United States adhere; which they support by speech and act — by advocating its principles and voting for its candidates for office; and that the determination of the question as to what persons and principles shall be in the ascendant in government for the time being depends upon the belief of the voter that the speech and the act of the candidate are true indexes of his opinion. The trustees are to inquire and decide concerning a given man whether they believe that he adhered to and supported the principles of the Demo-

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cratic party; and they may well rest upon reasons which are sufficient to control the general mind of voters in a matter of the highest importance.

They may be "orphans." This word describes a child who has lost one or both of its parents. He may be extremely young and so of course without character, religious belief, or political principles, and as by law neither women nor children vote, so in the common speech neither are said to have Democratic or other political principles. Therefore it must be determined to have been the intent of the testator, as to an orphan not of sufficient age to have acquired a character, that he should have been born of white, American and Protestant parents, of a Democratic father, and be destitute; and as to a widow, that she should be worthy, deserving, poor, white, American, Protestant, and have had a Democratic husband.

The Superior Court is advised that the bequest for "the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of Bridgeport, Connecticut," is valid; and that the legacies by the codicil to the Bridgeport Protestant Orphan Asylum and to the Bridgeport Hospital are payable at the expiration of one year from the death of the testator.

In this opinion the other judges concurred.

STATE V. BEAUDET.

(28 Conn. 506.)

Criminal law — evidence — threats of third person.

On trial for assault with intent to murder, where the defense is that a third person was the assailant, evidence of that person's threats against the assailed person is inadmissible.

CONVICTION of assault with intent to murder. The opinion states the case.

H. Zacher and S. W. F. Andrews, for appellant.

T. E. Doolittle, State's attorney, for State.

LOOMIS, J. The prisoner was tried upon an information for an assault upon one Dr. Walter Zink with intent to murder. He was at the time in Dr. Zink's employ and an inmate of the family, the other members being the wife of Zink, who was very deaf, a daughter aged fifteen, and a little son much younger. The State claimed to have proved that the prisoner was present in the room with Dr. Zink a short time before the commission of the offense and was found in the house shortly after. The assault took place in the dining room of the house a few minutes after eleven o'clock in the evening. Dr. Zink at the time had upon his person two rolls of bills, one of \$56 and the other of \$200. During the day-time preceding the assault he had received \$16 or \$18 from one Robert Dougherty, who then had opportunity to see one of the rolls of bills.

On the south side of Zink's house, leading from the street to the barn, is a driveway, and on the easterly side is a fence and gate leading from the driveway to an orchard on the south. That part of the driveway opposite the gate consists of soft and sandy soil. Very soon after the assault, and before any other persons arrived, the prisoner and Mrs. Zink passed out of the house and with bare feet went over the driveway and through the gate into the orchard, the prisoner going a few feet ahead. At a place about fifteen feet beyond the gate Mrs. Zink discovered on the ground a roll of bills, consisting of \$200. She also picked up a watch beside the driveway, and some bills in the dining room, and the prisoner also picked up some silver money there. They both returned into the house and made no further search. Early the next morning the impression of bare feet of human beings was noticed in the sand of the driveway leading to and from the gate into the orchard. They were examined by the coroner of the county and by others, and at the coroner's suggestion Dougherty and the prisoner made impressions on the sand with their bare feet, which were measured and compared with those on the driveway. The latter indicated that the second toe was somewhat longer than the first. The experimental impressions made by Dougherty were nearly the same as those found on the driveway, while those made by the prisoner were a quarter of an inch less in length and a little less in width, but no other difference was mentioned. At about ten o'clock on the evening of the assault Dougherty was in the Linsley House, situated from twelve to fifteen hundred feet distant, and remained

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there until half-past ten, when he left and was last seen near there on the railroad track very drunk, staggering, and on the road to his house. In addition to the other circumstances the State relied upon the confession of his guilt by the accused, as shown by the testimony of two witnesses.

Upon the trial a witness was asked "whether Dougherty upon that night in that saloon, between the hours of half-past nine and half-past ten, made any threats against Dr. Zink?" and another witness was asked "whether on the day before the assault, Dougherty in his hearing made any threats against Dr. Zink?" Both questions were excluded by the court and exception taken by the defendant's counsel; and this ruling presents the only question for review.

At the outset it should be noticed that the offer was simply to prove the threats of Dougherty against Dr. Zink. Any threats of any kind would have filled the offer. What act Dougherty threatened to do, or when or how he was to do it, was not indicated; nor was the offered evidence accompanied with any claim, or even a hint, that it could or would be supplemented by further testimony. Indeed, it nowhere appears in the record that it was even claimed in behalf of the prisoner that Dougherty committed the offense or that any evidence admitted or to be offered would show it. The threats, whatever they were, so far as appears, were entirely isolated from the transaction in question, and tended in no way to elucidate or give character to any material act or fact in the case. They could not therefore have been received as part of the *res gestæ*. As to the threats in the saloon, the only thing it would seem which they characterized was the drunken condition of the one who uttered them.

We will first consider whether the exclusion of this evidence injuriously affected the accused. If it could not properly have changed the result, then he was not aggrieved by the ruling. In this part of the discussion we assume, as the record justifies us in assuming, that no further evidence affecting Dougherty was to be offered. If then we supply the additional fact of threats made, and assume, for the benefit of the accused, beyond what the record states, that they were threats of personal violence, could they by any possibility have shown Dougherty guilty of the attempted murder, so as to relieve the accused? Would the offered evidence have rendered any of the circumstances relied upon by the State inconsistent with the

guilt of the accused or consistent with his innocence? Would it have accounted for the money found in the very path the accused took that night, soon after the offense was committed, and immediately after it was discovered, as the State claimed, that Dr. Zink had recovered his consciousness? Could it possibly have tended to show that the accused had no particular motive hastily to rid himself of the fruits of the crime which Dougherty might not also have had? It does not seem to us possible that the proposed evidence could have impaired in the least the circumstantial evidence against the accused; and surely no one would claim that it could affect the evidence derived from the confession of the prisoner. In regard to the evidence furnished by the coroner's experiment with the tracks, it may not be amiss to remark that its only possible bearing would be to furnish presumptive evidence that Dougherty and not the accused went there that night soon after the offense was committed, but there seems to have been direct evidence to show that the accused went over the drive-way in his bare feet, as did Mrs. Zink also, and it is pretty certain that they made impressions on the soft and yielding sand opposite the gate, and the difference in size which the measurements indicated could be readily explained by the fact that in one case the impressions were made while standing still and in the other when moving rapidly forward.

But the counsel for the accused in substance claimed before this court that the State relied upon opportunity to commit the crime in the absence of any motive attributed to the accused, and that the excluded evidence would have shown both motive and opportunity in another, and therefore if received would have weakened the case for the State. Waiving any criticism on this imperfect statement of the claims of the State, we suggest that that the threats had no bearing at all upon the question of opportunity. The opportunity of the accused, though obviously better than that of any one else save Mrs. Zink, was far from being exclusive. It was quite possible for Dougherty or others to be there. Now as to the motive relied upon by the State, it was not hatred or revenge, but love of money. We should not expect a person impelled by such a motive to utter threats at all; he would go stealthily to assail his victim. In this point of view the threats uttered by Dougherty, if they might otherwise have indicated ill will on his part, could not have affected the motive that moved the accused or have weakened the evidence relied upon to connect him with the crime.

But we will forbear further discussion of this aspect of the case as it is not necessary to place our refusal to grant a new trial on this ground, and proceed to consider the precise question raised by the appeal, namely, were the threats of Dougherty admissible at all under the circumstances stated—and if so, upon what principle? The only plausible ground for the admission is, that as the accused might exculpate himself by showing that another was the guilty party, so any item of evidence which would have been admissible had such other person been on trial, should be received in his favor. We concede the premises, but not the conclusion; for under the rules of evidence it makes a vast difference whether declarations offered in evidence come from the party on trial or not. In the one case they are universally admitted, unless irrelevant or self-serving. In the other they are by general rule excluded, subject to a few well marked exceptions. In 2 Best on Evidence, § 506, under the head of "*Res inter alios acta*," it is said: "No person is to be affected by the words or acts of others, unless he is connected with them either personally or by those whom he represents or by whom he is represented." Were this a civil suit in favor of Dr. Zink against the same defendant for the same assault, would it occur to any one to offer the declarations of Dougherty that he intended to do the act, or even that he had done it? Is it any the less a matter *inter alios* when the State is a party? In either case it would be a legitimate defense that another person had committed the deed, but in neither would his threats alone be admissible.

Now to illustrate some of the reasons for such distinction we will add, that where the threats of the one on trial are adduced against him he is always present in court to deny or qualify them, to show that the witness misunderstood, misremembered or was false, or to explain how the threats were uttered in a transient fit of anger or from mere bravado or for intimidation; but where the threat of a third person is introduced he may be far away, and no one can explain its real meaning; and beside, the very introduction of such a collateral issue serves greatly to confuse and mislead the triers, and justice may thereby be defeated. And if the jury were to pass on the collateral issue, it would have no other effect than to acquit the one on trial; the third person could be in no wise legally affected. If he should afterward be indicted, and put on trial for the same offense, he would still be at full liberty to show his innocence, notwithstanding the fact that the former finding of his guilt

caused another's acquittal. And so if he had previously been tried and acquitted, the fact could in no wise affect the admissibility of his declarations when afterward another person is on trial for the same offense, for the latter would be no party to the verdict. It is therefore going far enough in favor of the accused to allow him to exculpate himself by showing the fact of another's guilt by some appropriate evidence directly connecting that person with the *corpus delicti*. The animus of a third person is no defense, and by itself it cannot prove the ultimate fact which is a defense. Even as to the threats of the person on trial, Wharton, in his Criminal Evidence (8th ed.), § 756, says they "are admissible in evidence, not because they give rise to a presumption of law as to guilt, which they do not but because from them in connection with other circumstances, and on proof of the *corpus delicti*, guilt may be logically inferred." Then follows a list of infirmative suppositions, designed to show that because one threatens to commit a crime it does not follow that such intention really existed in his mind, much less does it show the actual commission of the crime. Nearly all treatises on evidence contain similar cautions. In 3 Bentham's Judicial Evidence, 75, it is said that "declarations of an intention to commit a crime are no less susceptible of being false than declarations of the opposite cast, namely, declarations of an intention to abstain from the commission of that or a similar crime."

We insist therefore that it is reasonable to exclude the mere disconnected threats and declarations of third persons. If they are parts of the *res gestæ*, or form links in a chain of evidence connecting with the crime itself, they may doubtless be received. If the threats were to commit a crime in a particular mode, and it was in fact so committed, perhaps they would then be admissible. But in the case under consideration there is nothing at all to show that the thing threatened had any sort of resemblance to the thing done either in kind or mode.

But if we suspend our discussion of the principles which ought to be applied to the question and pass to the consideration of the decided cases as found in other jurisdictions, we shall find the ruling of the court vindicated, not simply by the preponderance of judicial authority, but by absolute unanimity, save in one case, in Louisiana, which for reasons to be suggested hereafter can have little weight in the opposing scale.

We will first cite cases precisely analogous to the case at bar in

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that threats of third persons prior to the commission of the crime were offered in evidence by the accused and excluded; but the threats, instead of being vague and indefinite, as in the case at bar, were generally very specific and significant.

The case of *State v. Davis*, 77 N. O. 483, was an indictment for murder. On the trial the prisoner proposed to prove by one Peck "that George Nicks had malice toward the deceased and had a motive to take his life, and opportunity to do so, and had threatened to do so before the court." He further offered to prove by one Rice "that one Peck took a gun and went in the direction of the house of the deceased some time before the deceased was killed." The court says: "Both exceptions are untenable and have been repeatedly so held by this court; the first, because they are declarations of a third party and are *res inter alios acta* and have no legal tendency to establish the innocence of the prisoner, and the second for the same and the additional reason that the time is too vaguely and indefinitely set forth. * * * Such evidence is inadmissible because it does not tend to establish the *corpus delicti*. Unquestionably it would have been competent to prove that a third party killed the deceased, and not the prisoner. But this could only have been done by proof connecting Peck with the fact, that is with the perpetration of some deed entering into the crime itself. Direct evidence connecting Peck with the *corpus delicti* would have been admissible. After proof of the *res gestae* constituting Peck's alleged guilt had been given, it might be that the evidence which was offered and excluded in this case would have been competent in confirmation of the direct testimony connecting him with the fact of killing. No such direct testimony was offered here. It is unnecessary to elaborate, as the questions of evidence here made have been fully discussed and decided by this court in many cases. It is only necessary to refer to the principal ones. *State v. Bishop*, 73 N. O. 44; *State v. May*, 4 Dev. 328; *State v. Duncan*, 6 Ired. 236; *State v. White*, 68 N. O. 158."

These cases are all pertinent and supported by similiar and some additional reasons. We will not take the time and space necessary for a particular statement of the evidence offered and the reasoning of the court sustaining its exclusion. To the above list we will add the case of *State v. Haynes*, 71 N. O. 79.

In *Crookham v. State*, 5 W. Va. 510, it was held that it was no error to exclude testimony offered by the prisoner to the effect that

another and a different person from himself had made threats to kill the deceased, just before the commission of the offense with which he was charged, and that immediately after the offense such other person left the country and has not since been heard from.

In *Boothe v. State*, 4 Tex. Ct. App. 202, and in *Walker v. State*, 6 Tex. Ct. App. 576, both being indictments for murder, it was held not competent for the accused to prove that a very short time before the homicide a person other than the accused made threats to take the life of the deceased. In the last case the court supported the ruling by saying: "The issue of the trial was the guilt or innocence of the defendant on trial. Evidence is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; and this seems to be the limit, and excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and for the good reason stated for the rule by Mr. Greenleaf, that such evidence tends to draw away the minds of the jury from the point in issue and to excite prejudice and mislead them. 1 Greenl. Ev., §§ 51, 52."

We may add that the doctrine of these cases has received the recent approval of jurists and text-writers of high authority. Wharton, in his treatise on Criminal Evidence, § 225, says that "evidence of threats by other persons is inadmissible." The same doctrine is found in Wharton on Homicide, § 693. In 2 Bishop on Criminal Procedure, § 623, it is said: "The declarations of the deceased, as of any third person, when not of the *res gestæ*, or dying declarations, or communicated to the defendant so as possibly to influence his conduct, are excluded by rules which have been supposed to promote justice on the whole; at all events, which have become parts of the common law, not within the discretion of the courts to set aside. Hence they are not admissible." And again, in the first volume of the same treatise, section 1248, it is said: "In general what one says, as for example, that he committed the crime in question, will not be admitted for or against another."

In further support of the ruling complained of we adduce a few of the numerous decisions holding that admissions of third persons, that they and not the accused are guilty of the crime charged, are to be excluded.

In the early case of *Commonwealth v. Chabcock*, 1 Mass. 143, the

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prisoner was tried on an indictment for breaking into a house, and also for stealing goods therein. The defendant offered to prove by a witness present that another person had owned to the witness that he had stolen some of the articles mentioned in the indictment. The court held that the evidence could not be admitted, saying: "It was no more than hearsay. If a person other than the defendant had stolen the goods it was undoubtedly competent to the defendant to prove the fact in exculpation of himself, but not by the mode of proof now offered."

In *Smith v. State*, 9 Ala. 990, the prisoner (a slave) was indicted for the murder of one Edmund (also a slave). All the evidence was circumstantial. Sam, another slave, had been tried and acquitted for the same murder previously. On the trial it seems there was a strong array of circumstantial evidence against him, but Sam stated that a few days after the murder Smith told him that he killed Edmund. The particulars of the statement we omit. But on the trial of Smith evidence was offered in his behalf that Sam during his own trial had become alarmed and had told the witness that he had wrongfully accused Smith of the murder of Edmund and he did not wish to die with a lie in his mouth. The counsel for the accused [claimed that it was competent for the prisoner under the circumstances to show that another committed the murder, and that in this view the declarations of Sam should have been received, as they tended to inculcate him as well as to show that the prisoner was not the offender. ORMOND, J., in delivering the opinion of the court, said: "Conceding the true meaning of these declarations of Sam in jail to be an admission of his own guilt and that he had killed Edmund himself, it does not vary the case in the slightest degree. * * * The declaration of Sam was not an act within the meaning of the doctrine I have been discussing. * * * To give effect to the mere declarations of third persons would be a most alarming innovation upon the criminal law. Such a declaration would not be obligatory on the person making it. He might afterward demonstrate its falsity when attempted to be used against him. Such testimony may be a mere contrivance to procure the acquittal of the accused."

In *West v. State*, 76 Ala. 98, the question was again before the highest court of the same State, and it was held "that the admission of a third person that he committed the offense with which the accused was charged, not made under oath, though on his

death-bed, is mere hearsay, and is not admissible as evidence for the accused."

In *Sharp v. State*, 6 Tex. Ct. App. 650, it was held no error to refuse to allow a witness for the defense to testify that certain other men confessed that they committed the crime. A similar ruling was also sustained in *Rhea v. State*, 10 Yerg. 258.

Greenfield v. People, 85 N. Y. 75; s. c., 39 Am. Rep. 636, was an indictment for murder. Upon the trial the accused offered the letter of one Royal Kellogg to his brother, in which after alluding to the murder, he said among other things, "If they want me they can come and get me," and in connection with the above and with certain anonymous letters containing confessions, they offered the declarations of Kellogg and his brother and another person, made within an hour after the murder and at a place three-fourths of a mile distant. The witness being awakened by the barking of a dog at about four o'clock in the morning, on looking out the window recognized the two Kelloggs and one Taplin, and they had a gun and a bag, etc. The witness, after giving in detail their suspicious actions at this place, was offered to prove that Taplin said to the Kelloggs on that occasion before they left—"You were damned fools to do it," and that one of the Kelloggs replied—"If we had not done it we should all have been hung." MILLER, J., in delivering the opinion of the court said: "Even if this letter could be regarded as a confession of Kellogg that he committed the murder, it was only the declaration of a third party, merely hearsay testimony, and upon no rule of evidence admissible. If such declarations were competent upon any trial for homicide they would tend to confuse the jury and to divert their attention from the real issue. The letter did not tend to establish that Kellogg committed the offense, was not a part of the *res gestæ*, and in no sense relieved the prisoner from the charge for which he was upon trial, or raised any presumption that Kellogg was the guilty party. Confessions of this character are sometimes made to screen offenders, and no rule is better established than that extra-judicial statements of third persons are inadmissible. Whart. Ev., § 644; Whart. Crim. Law, §§ 662, 684; 2 Best Ev., §§ 559, 560, 563, 565, 578. * * * While evidence tending to show that another party might have committed the crime would be admissible, before such testimony could be received, there must be such proof of connection with it, such a train of facts and circumstances, as tend clearly to

point out some one besides the prisoner as the guilty party. Remote acts disconnected and outside the crime itself cannot be separately proved for such a purpose. In considering the question we have carefully examined the numerous authorities cited to sustain the position that the evidence was competent, and none of them hold that under such circumstances it could lawfully be received, and it was neither admissible alone nor in connection with the letters referred to.

In Whart. Crim. Ev., § 225, it is said: "Extra-judicial statements of third persons cannot be proved by hearsay, unless such statements were part of the *res gestæ*, or made by deceased persons in the course of business, or as admissions against their own interests, or are material for the purpose of determining the state of mind of a party who cannot be examined in court. * * * Hence on an indictment for murder the admissions of other persons, that they killed the deceased or committed the crime in controversy, are not evidence; and evidence of threats by other persons are inadmissible. * * * On an indictment for larceny also, declarations of third parties that they committed the theft are inadmissible."

In all the numerous cases we have examined where threats of third persons were excluded, there was no dissenting opinion in any instance, and after most diligent search we have been able to find but one case which furnishes any support to the claim of the accused. We refer to that of *State v. Johnson*, 30 La. Ann. 921, where the State, in a prosecution for murder based entirely on circumstantial evidence, found it necessary to trace to the accused a motive for the homicide in a previous quarrel with the deceased, when the accused while in liquor uttered threats against the deceased, and upon cross-examination the witness for the State, who had in chief testified to the quarrelsome character of the deceased and to the threats of the accused, was asked "what other quarrels the deceased had besides that with the accused, a few days prior to the murder;" and the trial court excluded it. The court of review cites no authorities and enters into no discussion of the question upon principle, but simply says in effect that although it was of doubtful admissibility, yet on the whole they will give the accused the benefit of a new trial.

But even this case can be widely distinguished from the one on trial. The State had put in issue the quarrelsome character of the

deceased, and to that extent the cross-examination was pertinent, and further, the case seemed to be controlled by the question whether the motive arising out of a recent quarrel pointed exclusively to the accused; the fact drawn out on cross-examination might show that it did not, and therefore there was some force in the claim that it was admissible in order to weaken that evidence by showing that others were also included and shared the same motive. But in the case at bar we have already called attention to the fact that the motive which moved Beaudet was entirely different from that attributed to Dougherty, and hence the evidence as to the latter in no way impaired that applicable to the former.

In regard to the admissibility of the confessions of guilt by third parties in criminal trials, there is absolute unanimity in the decisions so far as we have been able to ascertain. In *Smith v. State*, *supra*, GOLDTHWAITE, J., dissents from the majority opinion, but in so doing he expressly concedes "that the confession of a third person of his guilt is not evidence in favor of another, when standing alone unaided by other facts and circumstances;" yet he contends that "it is so whenever the party confessing is connected with the crime by strong presumptive circumstances." We find also a qualification of the doctrine in the dictum of a distinguished reporter. It is found in a note to the case of *Speare v. Coats*, 3 McCord (S. C.), side page 232, where the reporter gives a summary of the exceptions to the rule excluding hearsay evidence, and in paragraph twelve says: "So confessions *in extremis* that the person himself had committed a forgery of which another was indicted are admissible," citing as authority *Clymer v. Littler*, 1 W. B. 345. The reporter then adds his own opinion: "So I should think that where a person comes forward and confesses the crime, and surrenders himself to justice, such confessions would be admissible evidence for a prisoner accused of the same offense." It should be observed that stress is placed on the fact that the person confessing also surrenders himself to justice, implying that the confession alone would be insufficient, but we ought also to add that the principle of the case cited from 1 W. Black. 343, which led to and suggested the proposition just referred to, owing to some oversight or mistake was stated in an erroneous and most misleading manner. It would be supposed upon reading the note of the case that upon the trial of one person indicted for the crime of forgery the confessions *in extremis* of another person were held ad-

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missible in defense of the person on trial. But it was no such case. On the contrary it was a mere civil action based upon a controversy between adverse claimants to property under two different wills of one Clymer, deceased. The action was ejectment. The plaintiff claimed under a will made in 1743. The defendant claimed under the heir at law by an instrument dated in 1745, very imperfect in form, but purporting to have been subscribed by Mr. Clymer, and to give the property as follows: "Whereby, in consideration of natural affection, he covenants and agrees" (but with nobody) "that the" lands in question "shall go and be given to his wife for life, and then to Elizabeth, wife of William Medlycott," (she being also his heir at law), "and their heirs forever." It was attested by the said William Medlycott and Elizabeth Mitchell. The first will was concealed, and William Medlycott took possession under the last one in right of his wife, but on his death-bed in 1746 he declared that the instrument of 1745 was forged by himself, and he produced from under the bed-clothes the first will of 1743, and caused it to be sent to the parties interested, who had it proved, and then brought this suit, and this evidence without any objection went before the jury in connection with the inspection of the two wills, and a verdict was rendered for the plaintiff. Lord MANSFIELD, in giving the opinion of the court on this point, simply says: "The testator died in 1746. Both wills in the custody of Medlycott. The other subscribing witness dead. His wife to be benefited under it. He, on his death-bed, sends the lessor of the plaintiff his title, which is inconsistent with that under which the defendant claims. Under all these circumstances I think it admissible evidence. No general rule can be drawn from it. No objection was made to its production. It came out, it seems, on the cross-examination of the defendant's counsel. Unless therefore manifest injustice had been done on the whole case there is no ground for a new trial. There appears to be good reason for the verdict."

A further criticism of the proposition referred to may be found in 2 Phillips on Evidence (4th Am., from 7th London ed., Cowen and Hill's notes), p. 703, note 493: "And if an actual surrender should make the declaration admissible, it would at once throw open the door for fraudulent testimony, even in exculpation of the most atrocious criminals. The self-accuser is yet to be tried, and he may act under the full consciousness of having such clear proofs

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of his own innocence, an *alibi*, or some other evidence, that he would be risking but little by doing the whole as an act of solemn trickery in behalf of his friend. The surrender would not estop him, even should the people prosecute, convict and execute him as the sole malefactor, the verdict would not estop them nor be any evidence whatever against the first accusation. It would be *res inter alios*."

There was no error in the ruling complained of.

In this opinion the other judges concurred.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

HAWKINS V. JOHNSON.

(105 Ind. 39.)

Master and servant — negligence — contributory.

The plaintiff was employed by the defendant to haul goods to his factory, and unload them at a point to reach which it was necessary to drive under a rapidly revolving shaft. Without his knowledge, the shaft had been broken and repaired with projecting bolts, since he drew his last previous load, and the wagon-way had been narrowed by the piling of staves, and had been raised so that he could no longer drive under the shaft while sitting on the load. The bolts were not visible when the shaft was in motion. By order of the defendant's foreman he attempted to drive under the revolving shaft to unload at the usual place, and in trying to step over the shaft was caught and injured. *Held*, that he was entitled to recover unless the jury should deem him guilty of contributory negligence. (*See note*, p. 175.)

ACTION for personal injuries. The opinion states the case. The defendant had judgment below.

T. M. Clarke and *A. T. Rose*, for appellant.

O. S. Robbins, for appellees.

ZOLLARS, J. Appellant brought this action to recover damages resulting from a personal injury received at the stave factory of appellees.

The evidence tends to establish the following facts: Appellees, at the time of and prior to the injury of appellant, were the owners of a stave factory, the machinery of which was propelled by steam-power. An iron shaft, about two inches in diameter, extended horizontally from the factory building and connected with and furnished the means of operating a pump which supplied water for the boiler. The shaft was supported by two posts, which were about thirteen feet apart. Between these posts, and under the shaft, there was a wagon-way, used for bringing in staves to be worked in the factory. Frequently staves were thrown and piled between the posts, so that the way was narrowed to eight, nine and ten feet. The shaft was enough above the ground that a person might drive under it sitting upon a wagon loaded with staves. The shaft was operated by the engine in the factory, and when being used made about two hundred and sixteen revolutions per minute. It was smooth, having no projections upon it that would catch the clothes of a person in close proximity. This was the condition of things when appellant was employed by appellees to haul staves from the country and unload them in the yard of the factory. Three weeks prior to the injury appellant had brought in three or four loads of staves, and had driven over the way and under the shaft, and unloaded them at the usual place, and so far as shown, the only place where such staves were kept. Between this time and the time when appellant was injured, the shaft had been broken near the middle, and by appellees' direction had been repaired. It was repaired by means of a collar covering the break, and about two feet long. This collar was about a half inch thick, or three inches in diameter, and was kept in place by means of bolts passed through it and the shaft. The heads of these bolts protruded beyond the collar about a half inch. The other end of the bolts, with the nuts thereon, protruded about three-quarters of an inch beyond the collar. The way had also been raised, so that a person sitting upon a load of staves could not pass under the shaft. This was known to appellees, having been done by their direction. On the 6th day of January, 1883, appellant went to the factory with a load of staves, and was directed by appellees' foreman to drive under the shaft, which was then in motion, and unload the staves at the usual place. Appellant was ignorant of the facts that the way had been raised, and that the shaft had been broken and repaired. The foreman did not inform him of either fact. At that time also staves were

piled between the posts, so that the way was narrowed to eight or nine feet. Being thus ignorant and not noticing any change, appellant obeyed the direction of the foreman, and attempted to drive under the revolving shaft. When his horses came under the shaft he noticed that it was too low to permit him to pass under it. He thereupon dropped his lines and stepped over the shaft. In attempting to take them up again his clothes were caught by the bolts projecting from the collar on the shaft, he was lashed to it, and his right arm was so broken and torn that amputation was necessary. The increased size of the shaft at the place where it was repaired, occasioned by the collar, might have been noticed, but the projecting bolts could not have been seen when the shaft was revolving as it was.

The testimony of appellees' foreman is that he directed appellant to drive where he had been taking the staves before. There is no evidence that there was any other way to reach that place except the way under the revolving shaft, nor that the foreman indicated any other way aside from that which the appellant and others alike engaged had been accustomed to use. There is no direct evidence as to the powers and duties of the foreman, but it seems to have been conceded that he had authority to act for the principal and gave the directions he did.

Upon this evidence, which is within the issues, the court gave twelve instructions, to the giving of the 6th, 7th, 8th, 9th and 10th of which appellant excepted. First in the order of discussion by counsel is the ninth, which is as follows:

"9. It is insisted by the plaintiff that he was directed by defendants' foreman to drive with his loaded wagon under the shaft in question. If it is true, as plaintiff insists, that he was required to drive under the shaft, and that in obedience thereto he did so and was injured, still if you find it was an act of carelessness and negligence on the part of the plaintiff to drive under and step over the revolving shaft when his clothing was caught and he was dragged upon the shaft, then the fact that he was directed to drive under the shaft would not authorize plaintiff to expose himself needlessly and carelessly by stepping over the shaft. In passing a point of danger, the employee must not voluntarily expose himself to dangers and perils which he could avoid by another course of conduct or action, which reasonably might be adopted. When there are two or more courses of conduct or action before such per-

son equally within reach, and one or more of them dangerous and hazardous, and another not dangerous and hazardous, the employer has a right to expect that he will adopt the non-hazardous course; and if he voluntarily chooses to take the dangerous and hazardous course, and is thereby injured, he has contributed to his own injury and cannot recover."

The latter part of this instruction, at least, is erroneous, for the reason that it puts the case to the jury upon a basis not warranted by the evidence, and because therein the court usurps the province of the jury in determining what, in this case, might constitute contributory negligence on the part of the appellant. As we have seen there is no evidence that there was any other way over which the appellant might have driven to reach the usual place of unloading the staves. There is a conflict in the evidence as to whether or not the way under the shaft was sufficiently wide between the staves piled therein, to allow appellant to walk beside the wagon and drive his team. Doubtless he might have gone with the horses and led them under the shaft. It may be that the court had reference to one or both of these modes of conducting the horses under the shaft, in speaking of a non-hazardous course of conduct. However that may be, it was erroneous, under the evidence, to charge the jury that the employer, the appellees in this case, had the right to expect that appellant would adopt the non-hazardous course, if there was any. He did not know that there was any hazard. He had driven over the way before with safety, and so far as shown by the evidence, there was no danger in so doing. It had been rendered dangerous by reason of being raised, and by reason of the projecting bolts. Of these changes he had no knowledge. Being thus ignorant of the dangers that appellant had created, relying upon his former knowledge of the way as a safe way, and obeying the directions of appellees' foreman, they had no right to expect that he would get from his wagon and walk with his horses or beside the wagon, if that were possible, or that he would do otherwise than as he had formerly done. When appellant was directed by the foreman to drive over the way, he had a right to believe that it was at least as safe as when he drove over it on former occasions. Instead of appellees having the right to expect that he would discover the danger and adopt the less hazardous course, if there was any such, it was clearly their duty, when they, by their foreman, directed him to pass over the way to inform him of the changes

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and resulting danger. Neither an employer nor any other proprietor has a right to direct or invite an employee or other person, having business at and upon his premises, to drive over a particular way, and expect that such employee or person will take precautions to avoid unknown dangers. Such direction or invitation, in such a case, is an implied statement that the way is a safe way. The person thus directed or invited has the right to assume that the way is at least a reasonably safe one. *Nave v. Flack*, 90 Ind. 205; s. c., 40 Am. Rep. 205; *Indiana Car Co. v. Parker*, 100 Ind. 181.

The direction by the foreman in this case might well have thrown appellant off his guard, and occasioned the exercise of a less degree of care than he might have exercised but for such direction. Having directed appellant to drive over the way, and having given him no notice of the danger, appellees ought to be held liable unless appellant by the exercise of reasonable care might have discovered the danger and avoided the injury.

In all of the instructions the court below treated the case as being one of an employee engaged to work with and about machinery. We do not think that it is such a case. Appellant clearly was not employed to work with and operate machinery, nor was he, in a proper sense, employed to work about machinery; he was employed simply to haul staves to the factory. There was not necessarily any hazard connected with his employment; surely none as connected with the machinery of the factory. *Buzzell v. Laconia Manufg. Co.*, 48 Me. 113.

But if the case should be put upon the theory of the court, it would be no less the duty of the employer to inform the employee of increased danger created by him in the change of the machinery, unless the employee has notice, or such changes and increased danger are so apparent that he ought to take notice. *Atlas Engine Works v. Randall*, 100 Ind. 294; s. c., 50 Am. Rep. 798; *Baltimore, etc., R. Co. v. Rowan*, 104 Ind. 88; *Stringham v. Stewart*, 100 N. Y. 516; *O'Neil v. St. Louis Ry. Co.*, 9 Fed. Rep. 337; *Hobbs v. Stauer*, 62 Wis. 108; *Indianapolis, etc., R. Co. v. Love*, 10 Ind. 554; *Whart. Neg.* 206; *Buzzell v. Laconia Manfg. Co.*, *supra*.

Whether or not in this case appellant ought to have taken notice of the changes and resulting danger, and was guilty of contributory negligence because he did not avoid the danger by a different course of conduct, is another question. Following the portion of the instruction above commented upon, the instruction closes as

follows: "And if he voluntarily chooses to take the dangerous and hazardous course, and is thereby injured, he has contributed to his own injury, and cannot recover."

As applied to the evidence in this case, this instruction is, that if there were a hazardous course, and a non-hazardous course of conduct that appellant might have adopted, and he voluntarily chose to adopt the hazardous one, which was to step over the revolving shaft, he was guilty of contributory negligence, and cannot recover. This was a clear usurpation of the province of the jury.

As we have seen, appellant obeyed the direction of the foreman; he had no knowledge, nor was he warned, of the changes and resulting danger. He seems to have made no inspection of the way or revolving shaft before attempting to drive under it. He seems to have relied upon his previous knowledge and the direction of the foreman. He did not know, nor did he notice, that he could not pass under the shaft until his horse had come under it, and then, instead of stopping his horse, if that were possible, or dropping his lines and jumping from the wagon, or jumping from the wagon and holding on the lines, if either were possible, he dropped the lines, that they might pass under the shaft, and stepped over it and attempted to take them up. Whether he might have stopped the horses, got off the wagon and drove or led them under the shaft with safety; whether he might have jumped from the wagon and escaped injury, and whether or not one or the other of the above indicated courses of conduct was open to him, and whether one or the other was the most prudent for him to adopt under all the circumstances, and whether or not under all of the circumstance he acted as an ordinarily prudent person, were questions for the jury, under proper instructions from the court. The court could not say that one course or the other was the more prudent, nor that the adoption of the more hazardous was, under all the circumstances, as a matter of law, contributory negligence. *Indiana Car Co. v. Parker, supra*; *Louisville, etc., R. Co. v. Orr*, 84 Ind. 50; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Pittsburgh, etc., R. Co. v. Wright*, 80 Ind. 236; *Louisville, etc., R. Co. v. Richardson*, 66 Ind. 43; s. c., 32 Am. Rep. 94.

The adoption of the more hazardous course of conduct is not necessarily negligence. That depends upon the knowledge of the actor and circumstances under which he is called upon to act. He might be ignorant of the less hazardous course, and he might be

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called upon to act under such circumstances as that he should not be required to exercise the best judgment in choosing between different courses of conduct.

Mr. Wharton says: "A prompt and faithful employee, suddenly called upon by a superior to do a particular act requiring immediate attention cannot be supposed to remember at the moment the defect that would make his doing the act dangerous; and even if he should remember it, he may conclude, from the fact that he is ordered to do the particular act, that the defect, which would have interfered with the execution of such an order, is remedied." Whart. Neg., § 219, and cases there cited. *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa, 14; s. c., 4 Am. Rep. 181.

For the error in giving the ninth instruction the judgment must be reversed. We think it is not necessary to consider separately the other instructions, as what we have said disposes of the material questions made upon them.

The judgment is reversed, with costs, and the cause remanded with instructions to the court below to sustain appellant's motion for a new trial.

Judgment reversed.

NOTE BY THE REPORTER.—In *Haley v. Case*, Mass. Sup. Jud. Ct., July 8, 1886, plaintiff, a servant in defendant's employ, had driven a load of hay to defendant's barn, when he was personally directed by defendant to drive through a gateway for the purpose of unloading. In doing so, plaintiff was struck by a sign over the gateway and injured. There was evidence tending to show that defendant was familiar with driving such loads through the gateway, and that the plaintiff was not; that it was not apparent to the plaintiff from his position, and while managing the horses, that he could not drive through with safety, and that the defendant, from his position, had a better opportunity than plaintiff of personally observing the fact. *Held*, that the questions of negligence and of defendant's inability were properly left to the jury. The court said: "It is not denied that if Dodge was personally negligent in giving directions to the plaintiff in the performance of his work, and if the plaintiff used due care, both the defendants are liable. *Ashworth v. Stanoir*, 8 Ell. & Ell. 701. As the plaintiff was of full age and an experienced teamster, if the danger of driving the horses with the van under the gateway was well known to him, he cannot recover, although he was acting under the immediate personal direction of Dodge. The fear of the plaintiff that he would be discharged from his employment if he did not obey the orders of Dodge, his employer, would not justify him in running a risk which was well known to him, and then if injured, in recovering damages from his employer. *Russell v. Tillotson*, 140 Mass. 201; *Taylor v. Carew Manuf. Co.*, 140 Mass. 150; *Leary v. Boston & Albany R. Co.*, 139 Mass. 580; *Moulton v. Gage*, 138 Mass. 390; *Williams v. Churchill*, 137 Mass. 243.

"The principle is said to be that 'where the servant has as good an opportunity as the master of ascertaining and obviating the danger for himself, he will have no recourse against the latter.' *Frazer Trustee & Serv.* (3d ed.) 186; *Woodey v. Metropolitan District Ry. Co.*, 2 Exch. Div. 884; *Ogden v. Rummen*, 8 F. & F. 751.

"From the testimony it was competent for the jury to find that the defendant Dodge assumed the personal direction and control of the plaintiff in determining where the team should be driven, and that he was familiar with the practice of drawing loaded vans under the gateway; that the plaintiff had never driven under the gateway before; that the danger was not obvious from the place where the plaintiff started his team, in any such sense that it was not a reasonable opinion, from observation at this place, that he could drive through the gateway in safety; that the plaintiff's attention was necessarily chiefly devoted to the management of the horses, and that he did not discover the danger until it was too late to save himself; and that the defendant had better means of observation and of seasonably appreciating the danger, and either did not warn the plaintiff at all or warned him when it was too late. On such findings we cannot say that the plaintiff was not in the exercise of due care or that the defendant was. The test is not only what each knew, but what each reasonably ought to have known concerning the risk; and we cannot say that identically the same duty rested on the servant and on the master, seasonably to ascertain the extent of the danger involved in performing the work in the manner ordered by the master. If the master personally interferes in the performance of work, and in consequence of his negligence a servant is injured, the master is liable, unless the carelessness of the servant is a defense. *Roberts v. Smith*, 2 H. & N. 218. And when the master undertakes to direct specifically the performance of work in a particular manner, we cannot say as a matter of law that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the careful examination and vigilance which otherwise must be incumbent upon him. The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers, and when he is suddenly called upon to perform a piece of work in a particular manner, under the eye of his employer, he may not reasonably have time for the most careful observation.

"This court has perhaps recognized that the servant may put some reliance upon the master when he assumes control of the work and gives specific orders, and then there is not precisely the same obligation resting upon each to ascertain what the dangers are.

"In *Coombs v. New England Cordage Co.*, 102 Mass. 572, 585; s. c., 8 Am. Rep. 506, although the case was decided on the ground that the servant was incapable of understanding and appreciating the danger to which he was exposed, and that the employer set him to work without properly instructing him in regard to his work and the dangers attending it, the court say: 'Some allowance should be made for his youth, his experience in the business, and for the reliance which he might have placed upon the directions of his employers.'

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"In *Atlas Engine Works v. Randall*, 100 Ind. 206, it is said that 'if the attention of the appellee had been, as in the Massachusetts case, withdrawn from the source of danger by the requirements of his employment, the case would involve considerations which are conspicuously absent.'

"*Keegan v. Kavanagh*, 62 Mo. 321, is the case of a hod carrier, who in obedience to a positive order of his master went down to build a stone wall at the foot of an embankment of earth, which was not shored or propped, and which fell upon the plaintiff. The court say that 'if the risk is such as to be perfectly obvious to the sense of any man, whether servant or master, then the servant assumes the risk,' but that 'the superior information of the master was relied on, and his better means of information as to the character of the ground,' and a verdict for the plaintiff was sustained.

"In *Lee v. Woolsey*, 20 Rep. 469, it is said that 'if an employee is in haste called upon to execute an order requiring prompt attention, he is not to be presumed necessarily to recollect a defect in machinery, or a particular danger connected with his employment, so as to avoid it.'

"The plaintiff in this case was an experienced teamster, but he may not have had the same experience as the defendant Dodge of the probability of driving safely the loaded van under the gateway. The more important matter however is that he might not have had the same opportunity of estimating the danger, and from his employment he was required to devote his attention principally to the management of his horses, while his master had assumed the responsibility of directing where the plaintiff should drive, and was free to observe carefully all the dangers which the plaintiff incurred in executing his orders. We think that the requests for instructions were properly modified by the consideration of the fact that the plaintiff was acting in the presence and under the direction of one of the defendants, who was his master."

CONNER V. CITIZEN STREET RAILWAY COMPANY.

(105 Ind. 62.)

Negligence — contributory — leaving moving street railway car.

It is not necessarily negligent to step off a street railway car in slow motion.

ACTION for personal injuries. The opinion states the case. The defendant had judgment below.

L. Ritter, E. F. Ritter and B. W. Ritter, for appellant.

F. Winter, W. W. Herod and H. C. Allen, for appellee.

MITCHELL, J. This was a suit brought by John I. Conner against the Street Railway Company to recover damages for per-

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sonal injuries sustained by him on account of alleged negligence on the part of the railway company.

The appellant had judgment upon a special verdict at Special Term. This was reversed on appeal to the General Term, and the record is now here with an assignment that the General Term erred in reversing the judgment of the Special Term.

The questions for decision arise on the special verdict returned by the jury.

Summarized, the material facts returned were: That the railway company, on the 7th day of May, 1883, owned and operated a street railway, for the carriage of passengers over certain streets in the city of Indianapolis. That on the days mentioned three of the defendant's cars, by reason of a mule attached to one of them having balked, had become "bunched," or collected together, at a point on its line, so that they had lost their proper time or interval. An officer of the company, who was on the front car, directed that it and the car succeeding it should be driven rapidly, without stopping to receive passengers, so to regain their proper distance from each other, and that the third, or rear car, should receive such passengers as should present themselves. Pursuant to direction, the three cars started down College avenue. Two of them were driven in a fast trot. The first car passed the point where the plaintiff was standing without slackening its speed. When the second, as we infer from the finding, approached the footway at the crossing where the plaintiff was standing, that being the usual place for receiving passengers, the plaintiff, as the finding recites, "gave notice to the agent, an employee in charge of said car, that he desired to take passage therein as a passenger." That the car was one of the regular vehicles for carriage of passengers, and that there was room in the car, so that he could have been carried without inconvenience to himself, the defendant, or to other passengers therein. It is then found that the plaintiff was not "instructed by an officer or agent of the defendant to get upon said car." That as the car came up to where plaintiff stood its speed was slackened from a rapid trot to a walk, and when the rear step came about over the walk it was moving slowly. That it was the defendant's custom to slacken the speed of its cars to let men passengers on or off while in motion, as the plaintiff well knew. That the plaintiff attempted to enter the car by the rear door, and stepped one foot on the step, and partially took hold of the iron railing with one hand,

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when the driver struck the mules with his whip, suddenly increasing the speed of the car, which caused plaintiff to be violently thrown on the ground, from which he sustained severe injuries and bruises.

[Omitting another point.]

Eliminating the unauthorized conclusions drawn by the jury, we proceed to the consideration of the facts properly returned in the special verdict. Upon the facts so returned we think it clearly appears that the defendant was guilty of negligence, and that the plaintiff was without contributory fault.

While the plaintiff stood upon the crossing at the usual place where passengers were taken up, one car passed rapidly, without slackening its speed. Seeing the next approach at a rapid trot, he gave notice to the person in charge that he desired to be taken up. The speed of the car was slackened so that when the rear end came opposite the crossing it was moving slowly. It cannot be assumed that the plaintiff had information that the approaching car, one of the regular vehicles on the line, was not to take passengers. Being at the usual place where passengers were taken up, and having given notice to the person in charge of the car that he desired to be taken up, it was the plain duty of the driver, or person in charge, either to afford him reasonable opportunity to enter the car, or to notify the plaintiff, either by continuing the rapid pace, or in some other way, that he would not be taken. Instead of giving any sign that he would not be taken, the speed of the car was slackened, so that it was moving slowly when he attempted to get on. Having received a signal and slowed up in a manner to invite the plaintiff to get on, it was a clear act of negligence in the driver, or person in charge, not to observe the plaintiff; if he did not observe him, and while he was getting on the car in a manner in which the defendant usually received such passengers, to cause the car to be "jerked" forward, as the jury found.

Having giving notice of his desire to be taken on board the car, and its speed having been slackened so that it was apparently safe under ordinary circumstances, it was not negligence in the plaintiff to attempt to get on while the car was so in motion. He had a right to rely upon the watchfulness and care which it was the duty of the driver to bestow toward persons about to take passage, under the circumstances, and was not bound to anticipate that the car which he was getting upon might be "jerked" forward by an

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act of the driver, so as to put him in danger. *Chicago City R. Co. v. Munford*, 97 Ill. 560.

The rules applicable to persons getting on and off cars operated by steam are not to be applied in all their rigor to street railways operated by horse-power. A person having the free use of his faculties and limbs, and having given proper notice of his desire to be taken up, the car having slackened up in the usual manner, it is not negligence for him to attempt to get on while it is moving slowly. *Murphy v. Union R. Co.*, 118 Mass. 228; *Wyatt v. Citizens' Ry. Co.*, 55 Mo. 485; *Thomp. Carriers*, 443, 444.

The judgment of the General Term is reversed with costs. Petition for a rehearing overruled.

Judgment reversed.

ALEXANDER V. SWACKHAMER.

(105 Ind. 81.)

Conversion — property fraudulently obtained — innocent purchaser.

One falsely and fraudulently representing himself to be a member of a responsible firm of commission merchants obtained goods from the owner, giving a forged check of the firm in payment; he then shipped the goods to the firm, who in good faith sold them on his account to an innocent purchaser, who in turn sold them. *Held*, that the owner being innocent and not negligent was entitled to recover for their value from the last purchaser.

CONVERSION. The opinion states the case. The plaintiff had judgment below.

F. Winter and J. A. Holman, for appellants.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellee.

MITCHELL, J. There is no dispute concerning the facts which gave rise to this suit. The question is upon which of two innocent persons the law will cast the loss occasioned by the operations of one who, by the successful execution of a fraudulent scheme, obtained wrongful possession of property, which was afterward sold by commission men, to whom it was delivered for sale by the person who was fraudulently in possession of it.

Alexander v. Swackhamer.

On the 12th day of November, 1883, Swackhamer, a farmer residing in Clinton county, in this State, was the owner of forty head of cattle. A man calling himself Johnson, and representing that he was a member of the firm of Fort, Johnson & Co., who were general commission salesmen of live-stock at Indianapolis, called at Swackhamer's farm and proposed to purchase his cattle for the firm of which he represented himself to be a member. After looking at the cattle, and agreeing on the price, the owner of the animals was informed by the pretended Johnson that he carried no money with him, and that he would be obliged to deliver the check of his firm on their bankers at Indianapolis, in payment for the cattle. This arrangement was not at once entirely satisfactory to the seller. After some suggestions as to the manner in which he might assure himself of payment, it was agreed that Swackhamer should telegraph the banking house of S. A. Fletcher & Co., at Indianapolis, to ascertain the responsibility of the firm of Fort, Johnson & Co., and that the cattle should remain his property until paid for. The pretended Johnson remained over night with the farmer, who in the meantime dispatched an inquiry to the bankers referred to, concerning the standing and credit of Fort, Johnson & Co. Receiving a satisfactory answer he accepted a check signed "Fort, Johnson & Co." for the agreed value of the cattle, and turned them over to the purchaser, who said: "If this check is not promptly paid, these cattle are yours until you get your money." The cattle were driven to a railway station near by, and in the presence of Swackhamer a bill of lading was delivered to Johnson, billing the cattle to Fort, Johnson & Co. in care of J. Zeigler. The cattle were shipped directly to Indianapolis, and were received at the stock yards by the consignees. Swackhamer placed the check in the Farmers' Bank at Frankfort for collection. Two days afterward he was informed it was a forgery and had been returned unpaid. In the meantime the pretended Johnson had presented himself to Fort, Johnson & Co., under the assumed name of John Zeigler, and had procured them to sell the cattle on commission to the appellants, Alexander & Co. These gentlemen were cattle dealers, engaged in buying stock for eastern markets. They paid full value for the cattle, without notice of Swackhamer's claim, and believed Fort, Johnson & Co. were authorized to sell them as commission men. The cattle were immediately shipped east and sold by Alexander & Co. Both Fort, Johnson & Co. and the appellants acted in entire good faith, and

their relation to the whole transaction was according to the usual course of business. It turned out that the real name of the alleged Johnson was Kennedy, that he had no relation to or connection whatever with Fort, Johnson & Co., who had never seen him but once before, when he came into their office and inquired about the price of cattle, and remarked that he had a lot to dispose of in the country.

Swackhamer brought this suit against Alexander & Co. to recover the value of the cattle as having been converted by them. The plaintiff had a verdict for \$1,845, for which sum a judgment was rendered after a motion for a new trial was overruled.

The questions presented for decision arise upon instructions given by the court, and upon an instruction prayed by the defendant and refused.

The court instructed the jury, in substance, that if Swackhamer at the time of the transaction was, by the fraudulent practices employed by the person with whom he dealt, induced to believe that he was contracting with Fort, Johnson & Co., through one of the members of that firm, and that he was selling and delivering his cattle to that firm, when in truth he was not dealing with the firm, or with a person authorized to deal on its behalf, then the contract was wholly void, and the title and ownership of the cattle did not pass, even though the cattle were delivered into the possession of the person who falsely personated a member of the firm, and that, under such circumstances, the defendants, although purchasers in good faith, took no title to the property and would be liable to the plaintiff.

The court further instructed the jury substantially that if the sale was made under the false representation that the person to whom it was made was a member of the firm of Fort, Johnson & Co., and that he made the purchase for them upon condition that the title to the cattle was to remain in the plaintiff until the check delivered to him in payment was paid, then even though the cattle were delivered to the supposed member of the firm, the title and ownership remained in the plaintiff and the defendants, although purchasers in good faith without knowledge of the condition, would be liable for the value of the cattle.

The defendant asked the court to instruct, in substance, that if Fort, Johnson & Co. were known by the defendants to be commission men at the time they purchased the cattle from them, engaged

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in the sale of live-stock, and had the actual possession of the cattle in controversy, and assumed to sell them as commission men, then it was not necessary, in order to defeat the plaintiff's right, that he should have authorized Fort, Johnson & Co. to sell the cattle, or that he should have delivered them into the possession of that firm with the intention that they should sell them, but if he delivered the cattle to a person with knowledge that such person intended to consign them to Fort, Johnson & Co., and with knowledge that Fort, Johnson & Co. were commission men, engaged in the sale of cattle consigned to them, expecting at the time that he permitted them to be taken and consigned, that they would be sold by Fort, Johnson & Co., in the ordinary course of their business, and that they were so sold, then he must be deemed to have conferred such apparent authority upon the commission men to sell the cattle, as authorized them to pass the title to purchasers in good faith, even though the sale was upon the condition that the ownership should remain in the plaintiff until the cattle were paid for.

As relevant to the instructions given by the court, it may be said concerning the one first above summarized, it proceeds upon the theory that in every contract of sale an essential requisite to its validity is that there shall be two contracting parties.

The possession of property may be obtained from the owner by means of fraudulent devices, but it does not necessarily follow that the person to whom property is delivered in pursuance of such devices thereby becomes a purchaser, or that a sale, even though one was intended, has resulted from the transaction. If there was in fact no purchaser, there was no *de facto* sale. No contract resulted which required avoidance. The transaction was void.

Whenever property is obtained from the owner by fraud, it is therefore important to determine whether the facts show a sale to the party guilty of the fraud or a mere delivery of it into his possession as a result of the fraudulent devices practiced.

If the owner of goods is induced by fraudulent representations to deliver them to an irresponsible purchaser, in pursuance of a contract of sale to him, and such purchaser, while in possession, transfers them for a valuable consideration to a third person, who acts in good faith, without notice of the fraud, the title of the good-faith purchaser will prevail over that of the first owner. *Curme v. Rauh*, 100 Ind. 247; *Parrish v. Thurston*, 87 Ind. 437.

In the case before us, both upon the facts assumed in the instruction, and as they appear in the evidence, there was no contract of sale to the spurious representative of the firm, one of whose members he falsely personated. He did not propose to buy on his own account, nor did the plaintiff contemplate a sale to him.

The plaintiff contracted upon the supposition that he was selling to Fort, Johnson & Co., through the agency of a member of that firm. He did not agree to sell or contemplate a sale to any other person, nor did the person with whom he negotiated propose to purchase for himself or any other than Fort, Johnson & Co. The transaction resulted in a misadventure. No sale was made to Fort, Johnson & Co., and as no other was proposed or contemplated, none was made. In the language of the instruction given, the contract was wholly void. By means of a trick the naked possession of his property had been procured from the plaintiff, while the title and ownership remained in him, after the delivery the same as before.

No one can transfer a greater right or better title to property than he possesses himself. It follows necessarily when Fort, Johnson & Co. sold the cattle to Alexander & Co., at the request and for the benefit of the fraudulent possessor, they sold no better or greater right than he had. When therefore Alexander & Co. sold the cattle, they sold property to which the plaintiff had a perfect title, and when they received the proceeds of such sale they received money which belonged to the plaintiff. This amounted to a conversion of the plaintiff's property for which they were liable. *Hamet v. Letcher*, 37 Ohio St. 356; s. c., 41 Am. Rep. 519; *Barker v. Dinsmore*, 73 Penn. St. 427; s. c., 13 Am. Rep. 697; *Moody v. Blake*, 117 Mass. 23; s. c., 19 Am. Rep. 394; *Cundy v. Lindsay*, 3 App. Cas. 459; s. c., 24 Eng. Rep. 345.

In *McCombie v. Davies*, 6 East, 538, Lord ELLENBOROUGH said: "According to Lord HOLT, in *Baldwin v. Cole*, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it." So in *Hyde v. Noble*, 13 N. H. 494; s. c., 38 Am. Dec. 508, it was held that one who claimed a right to property under a purchase, from a person who had no title or power to sell, was liable for a conversion.

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The cattle were the property of the plaintiff, and their appropriation by Alexander & Co. was without authority. The unauthorized appropriation of another's property is as a rule sufficient to enable the owner to maintain an action for its conversion. A purchaser without notice from one who has no title and no right or apparent authority to transfer the property will not be a defense.

In *Hills v. Snell*, 104 Mass. 173; s. c., 6 Am. Rep. 216, it was said: "Even an auctioneer or broker who sells property for one who has no title, and pays over to his principal the proceeds with no knowledge of the defect of title or want of authority, is held to be liable for its conversion to the real owner. *Shearer v. Evans*, 89 Ind. 400; *Breckenridge v. McAfee*, 54 Ind. 141; *Curme v. Rauh*, *supra*; *Stanley v. Gaylord*, 1 Oush. 537; s. c., 48 Am. Dec. 643; *Gilmore v. Newton*, 9 Allen, 171; *Grunson v. State*, 89 Ind. 533; s. c., 46 Am. Rep. 178.

As upon the facts assumed there was no sale either absolute or conditional, so much of the second instruction given by the court as referred to a conditional sale was probably not entirely accurate.

The jury were correctly told in the first instruction referred to, that if certain facts and representations were proved, the pretended sale was wholly void. In the second, the same facts substantially were assumed, and to the facts assumed was added the further proposition, that if the sale was upon condition that the title to the property should remain in the plaintiff until the check spoken of was paid, then the sale was conditional and the plaintiff would be entitled to recover. There was no dispute about the material facts in the case, and as upon the undisputed facts there was no sale of any kind, the proposition relating to a conditional sale was wholly immaterial. The court should have so treated it as well in the instructions given of its own motion as in those refused upon the request of the defendants. If however the instruction given was erroneous, it was because, on all the facts assumed in it, the law was stated more favorably to the defendants than the rule warrants. If all the facts recited were proved, there was no sale of any kind, and the defendants were liable.

This practically disposes of the instruction prayed by the defendants. The difficulty with the instruction is that it is not predicated upon a state of facts upon which a sale of any kind can be founded, or upon which any apparent title, right or authority of the person

who obtained the cattle by fraud can be based. It proceeds upon the theory that the bare delivery of the cattle, under the expectation that they were to be shipped to a firm engaged in selling cattle on commission, would be sufficient to defeat plaintiff's right. We cannot give our assent to this proposition, as applied to the facts in this case.

The fact that possession of the plaintiff's property was obtained by the fraudulent practices alluded to, and under circumstances which neither divested nor in any manner affected his title, could invest the wrong-doer with no such apparent authority as to enable him by any means to communicate any right or title to another; and this would be so even though the plaintiff at the time he delivered the cattle supposed he had sold them to Fort, Johnson & Co., to be resold by them as commission men or factors.

Alexander & Co. can only protect themselves by showing some title, right or authority, real or apparent, in the fraudulent possessor of the cattle. In brief, the instruction asked, as applied to the undisputed facts, proposes that if possession of the plaintiff's cattle was obtained from him by a person who by means of false devices induced in plaintiff's mind the belief that he was selling and delivering them to a responsible firm of commission men, to be resold, when in fact he was not selling them to any one, then the person so obtaining possession had apparent authority to deliver them to the commission men in such manner that they could transfer the title to Alexander & Co., so as to shield them from liability. The only case brought to our notice which seems to lend any support to this view is *Roach v. Turk*, 9 Heisk. 708. The facts in that case were that Turk sent three bales of cotton to Commerce landing, on the Mississippi, to be shipped to Roach & Co., commission merchants at Memphis. Ware, a clerk of the shipping agent at the landing, received the cotton in the absence of his principal, and instead of shipping it in the name of Turk, shipped it in his own name. The commission merchants, without notice of the real owner, sold the cotton and paid the money over to Ware. It was held, overruling an earlier case, that the commission men were not liable to Turk, as for a conversion, without a demand for the cotton or its proceeds while it was in their hands.

Upon an examination of the case it will be found that the non-liability of the commission men was predicated upon the fact that they neither had the property, nor the proceeds arising from its

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sale in their hands at the time it was demanded of them. Without yielding our assent to the doctrine of the case cited, which we think is opposed by the authorities we have already cited and many others, we think it clearly distinguishable from the case before us.

The cattle in question were the plaintiff's property when Alexander & Co. received and sold them. The proceeds of the sale remained in their hands when the suit was commenced, and they asserted a right to it adverse to the plaintiff. This, on the doctrine of *Roach v. Turk*, *supra*, made them liable, as for a conversion.

If upon the facts assumed in the instruction asked by the defendants in this case, it had appeared that a conditional sale had actually been made, an entirely different question would have been presented. In such a case it might well be, although we decide nothing on the subject, that the purchaser on condition would be clothed with such apparent authority as that the severe rule of law applicable here would not be applied. Possibly the remedy of the vendor who confers upon another an apparent title by a conditional sale may be restricted to the right to recover the property, and that no one can be held responsible in tort for its conversion who merely "exercises such dominion over it, as is warranted by the authority thus given." *Hills v. Snell*, 104 Mass. 173; *Burbank v. Crooker*, 7 Gray, 158; s. c., 66 Am. Dec. 470; *Vincent v. Cornell*, 13 Pick. 294; s. c., 23 Am. Dec. 683.

As there is no error found in the record the judgment is affirmed with costs.

Judgment affirmed.

ELLIOTT, J., did not sit.

ON PETITION FOR A REHEARING.

MITCHELL, J. It is contended in support of the petition for a rehearing, that by delivering his property to the impostor under the circumstances disclosed, the appellee is estopped to assert, as against a good faith purchaser, that he has not by such delivery invested the impostor with apparent authority to sell the property. It is said the question is not whether the title passed by the transaction between the appellee and the swindler, but whether such an appearance of authority was created by delivering the cattle into his possession, with knowledge that they were to be shipped to a firm engaged in selling on commission, as that the appellee may not now assert any thing to the contrary.

In the consideration of this question at the former hearing, our opinion was adverse to the view of the appellants in this regard. We held that as one of the essential factors to a contract—one of the contracting parties—was entirely wanting, no contract resulted, and hence no title passed, and that a delivery under the erroneous supposition that a sale had been made neither invested the person to whom the delivery was made with title, nor with an apparent authority to sell or dispose of the property thus delivered. We adhere to this conclusion.

Our attention is called to the case of *Samuel v. Cheney*, 135 Mass. 278; s. c., 46 Am. Rep. 467. Upon an examination of the case we do not think it supports the appellant's contention. The origin of that case was a suit to hold a common carrier liable for goods delivered to a swindler. An impostor falsely personated a merchant in good credit, and ordered goods to be shipped to himself by the name of the merchant personated, at a given number. The goods were delivered by the carrier according to the directions upon them, to the person who actually sent the order. The consignor supposed the order was from the merchant. The merchant neither gave the order nor received the goods, but the carrier delivered the goods at the place to which they were directed and to the person who actually ordered them. It was held that the contract of the carrier was, not that he would ascertain who was the owner of the goods and deliver to him, but that it was sufficient to exonerate the carrier from liability for negligence if he delivered the goods according to directions to the person to whom they were sent. That the consignor directed and sent the goods to a person different from the one he actually intended, could not make the carrier liable for negligence in delivering the goods at the place to which they were directed and to the very person who ordered them. No question of title or apparent authority was involved in the case. The sole question related to the carrier's negligence.

The appellee was not estopped on the ground of negligence in delivering the cattle under the circumstances disclosed. To constitute an estoppel the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defense which he proposes to set up, and another must have acted on such admission with his knowledge and consent.

The owner of the cattle was induced to believe that he had made a sale to Fort, Johnson & Co. Acting on that belief, he delivered

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the property, as he supposed, to a member of the firm. For want of a purchaser no contract of sale resulted. No authority or appearance of authority was either conferred or attempted to be conferred upon the impostor other or different from that which would have attended a sale. When it resulted that no sale took place the delivery and all the incidents of the transaction were a nullity and ineffectual to support the claim of the purchaser. It was void *ab initio*. Unless negligence resulting in injury to another could be imputed to the owner of the property after he discovered or might have discovered the deceit practiced upon him, he had the right to treat the property as his own, and recover as for a conversion.

Upon the subject generally, *Edmunds v. Merchants, etc., Co.*, 135 Mass. 283; *Thacher v. Moors*, 134 Mass. 156; *Rodliff v. Dallinger*, 141 Mass. 1.

The petition for a rehearing is overruled.

HOUSE V. ALEXANDER.

(105 Ind. 109.)

Infancy — rescission of contract.

An infant farmer who has purchased a horse may rescind and recover the price paid.

ACTION for purchase-price of a horse. The opinion states the case. The plaintiff had judgment below.

J. S. Scobey, for appellant.

J. D. Miller and *F. E. Gavin*, for appellee.

ELLIOTT, J. The first paragraph of the appellee's complaint alleges that he is an infant; that he bought of the defendant a horse for which he paid \$150; that he tendered back the horse to the defendant and demanded the return of his money; that the purchase of the horse was not for his benefit. Prayer for a rescission of the contract and the recovery of the money paid.

In support of the attack upon this paragraph of the complaint, appellant's counsel quotes from 1 Pars. Cont. 322, the following:

"If an infant advances money on a voidable contract which he afterward rescinds, he cannot recover this money back, because it is lost to him by his own act, and the privilege of infancy does not extend so far as to restore this money unless it was obtained from him by fraud." This is not and never was the law. In *Shurtleff v. Millard*, 12 R. L. 272; s. c., 34 Am. Rep. 640, the court expressly repudiated Mr. Parsons' statement, saying: "He cites no authority. The doctrine so broadly laid down has been overruled by later authorities, and this passage has been condemned in *Robinson v. Weeks*, 56 Me. 102, 104; still the last edition of the text-book takes no notice of the fact." 1 Whart. Cont. 47; *Sparman v. Keim*, 83 N. Y. 245; *Cooper v. Allport*, 10 Daly, 352; *Carpenter v. Carpenter*, 45 Ind. 142; *White v. Branch*, 51 Ind. 210; *Dill v. Bowen*, 54 Ind. 204; *Indianapolis, etc., Co. v. Wilcox*, 59 Ind. 429; *Ayers v. Burns*, 87 Ind. 245; s. c., 44 Am. Rep. 759.

There is some conflict in the authorities as to whether an infant may avoid a contract and recover the money paid upon it without returning the property received by him, but there is no substantial difference upon the proposition that where he tenders back all that he receives, and seeks a recovery of the money paid by him, he is entitled to recover it. Our cases, beginning as far back at least as *Miles v. Lingerman*, 24 Ind. 385, hold that there may be a recovery, although the property received is not restored, but in this instance our decision stops far short of that, for here the contract was not for the infant's benefit, and he offers to restore the property received.

The theory of the third paragraph of the appellant's answer is that the horse bought of him was a necessary, for the reason that the appellee was engaged in farming, and needed the horse in order to successfully carry on his business. This theory is unsound. The law does not encourage persons to engage in business during non-age, but on the contrary, its policy is to keep infants from engaging in business until they have attained full age, and upon this ground it is uniformly held that articles purchased for business purposes, whether that of agriculture or commerce, cannot be deemed necessities. This is the law, as the courts declare, even though the infant depends upon his business for support. *Lowe v. Griffith*, 1 Scott. 458; *Latt v. Booth*, 3 C. & K. 292; *Mason v. Wright*, 13 Metc. 306; *Merriam v. Cunningham*, 11 Cush. 40; *Decoll v. Lowenthal*, 57 Miss. 331; *Grace v. Hal*, 2 Humph. 28; 1 Rol. Abr. 729; Oro. Jac. 494.

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Horses are not necessities. The court affirmed this general rule in *Price v. Sanders*, 60 Ind. 310, saying: "But it has been pithily and happily said that necessities do not include horses, saddles, bridles, liquors, pistols, powder, whips and fiddles." A verdict awarding compensation against an infant for the hire of horses and gigs was set aside in *Harrison v. Fane*, 1 M. & G. 550, as perverse.

In *Wharton v. Mackenzie*, 5 Ad. & E. 606, COLERIDGE, J., very strongly declares that horses are not necessities. The case of *Hart v. Prafer*, 1 Jur. 623, cannot be justly considered as an exception to the general rule, for although it was there held that a horse was a necessary, it was so because the infant had been directed to use one by his medical adviser, Sir Benjamin Brodie. In such a case as that it may well be that a horse is a necessary in the same sense that medicines and medical services are necessities.

We need not discuss the fourth, fifth and sixth paragraphs of the answer in detail, for what we have said disposes of the legal questions arising upon them.

The seventh paragraph of the answer alleges that the appellee ratified the contract after he became of age, but the facts stated do not sustain the conclusion of the pleader, and it is by the facts and not upon the conclusion that the sufficiency of the answer must be determined. The complaint avers that the appellee had disaffirmed the contract, had offered to restore the property, and had demanded the consideration paid for it, so that a mere retention and use of it after he attained majority cannot be deemed a ratification. We think it perfectly clear that after an infant has done all in his power to secure a rescission and has brought suit to rescind the contract, he cannot be held to have ratified the contract because the property is still retained by him. What more he could do to evidence his repudiation of the contract, or what more he could legally do toward putting it into the possession of the seller, we are at a loss to conjecture.

No objections to the testimony condemned by a general assertion are pointed out, and well settled rules forbid us from searching for them. If counsel expect to have objections considered they must specifically state in their brief what they are.

Sixteen days after the purchase of the horse the appellee took it and started to the appellant's house, but met the latter on the highway some distance from his house. What occurred at that time is thus described by the appellee: "I told Mr. House I had brought

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the horse back; he was not what I bought him for, nor what he represented him to be; I told him I wanted my money back; he said he would not give it; I got out and held the horse; Mr. House looked at the horse; he was afoot driving hogs, he said he would not take him; he said something about the horse being abused." This evidence shows that the acts of the defendant excused a tender; for it is settled law that where a tender is made and a reason is given for its rejection, which shows that a further tender would be fruitless, none other need be made. *Hanna v. Phelps*, 7 Ind. 21; s. c., 63 Am. Dec. 410; *Aetna Ins. Co. v. Shryer*, 85 Ind. 362, see p. 368. Conceding, but not deciding, that a tender was necessary, the evidence shows that a sufficient one was made.

Judgment affirmed.

Petition for a rehearing overruled.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY v. HAZELETT.

(105 Ind. 312.)

Insurance — wife — intemperance — forfeiture — cancellation — suicide — unintentional self-destruction.

A specific and separate stipulation in a policy of life insurance, that if the assured shall become intemperate to a certain degree the company may cancel the policy, supersedes a general stipulation that such a degree of intemperance shall work an absolute forfeiture.

A provision in a policy of life insurance, that if the assured, whether sane or insane, shall die by his own hand, the policy shall be void, has no application to a case where death ensues from an overdraft of whisky taken without any intention of destroying his life, by one who had become physically and mentally weak by causes beyond his control.

ACTION on a life insurance policy. The opinion states the case. The plaintiff had judgment below.

T. Hanna and S. A. Hays, for appellant.

M. A. Moore, G. C. Moore, D. E. Williamson, and A. Daggy, for appellee.

MITCHELL, J. Sarah S. Hazelett brought suit against the Northwestern Mutual Life Insurance Company, to recover the

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amount of a policy of insurance issued upon the life of her husband.

The policy stipulates that upon due proof of the death of William J. Hazelett, the sum of \$3,000 shall within a time limited be paid to his wife, Sarah S. Hazelett, as beneficiary. Issues were made upon a complaint filed in the court below, and upon trial by a jury, a verdict was returned, upon which judgment was entered for \$3,300, the amount of the policy and accumulated interest.

[Minor point omitted.]

A demurrer was sustained to the first paragraph of the defendant's answer. This ruling is assigned for error.

This answer sets up a defense, that the policy contained an express stipulation that if the assured should ever become intemperate or so far intemperate as to impair health or induce delirium tremens, the policy should become null and void. It avers that after the policy was delivered the assured did become intemperate to such a degree as to induce delirium tremens.

The second clause of the printed conditions upon which the policy was accepted, as therein recited, contains among many other prohibitions in respect to the conduct and occupation of the assured, a prohibition against intemperance, the substance of which is stated in the answer as summarized above. This clause provides that the doing of any or all of the things prohibited therein shall render the policy null and void.

The fifth clause of the printed conditions of the policy is as follows: "5th. If the said insured become habitually intemperate, or so far intemperate as either to impair health or induce delirium tremens, then in either such case, the company may cancel this policy, and thereupon be absolved from all liability upon the same except only the 'surrender value' thereof, computed according to the practice of the company, which surrender value it will pay on the surrender of this policy if applied for in the life-time of the insured and within one year from the cancellation of the policy."

In the clause first alluded to, intemperance to the degree of impairment of health, or of inducing delirium tremens, worked an absolute forfeiture. In the other, the result which was to flow from the same conduct was, that the insurance company might cancel the policy, and by that means absolve itself from liability, except for the "surrender value."

The first stipulation is found in a printed clause in which are

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contained numerous other conditions, the violation of any one of which was to render the policy void. The last is a separate clause of the contract and is complete in itself.

It thus appears that two stipulations were incorporated in the policy, covering the same subject-matter. The one providing that upon certain conditions the policy should become absolutely void; the other that upon precisely the same conditions, the insurance company might avoid the policy and absolve itself from liability to a certain extent. Since both of these conditions cannot stand together, the inquiry is, which shall prevail?

While forfeitures are never favored, yet if upon a reasonable construction it appears that the parties contracted for a forfeiture upon certain conditions, it only remains for the courts to enforce the contract as the parties have made it. It is neither unlawful nor against the public policy for a contract of life insurance to stipulate that upon certain conditions or contingencies the policy should become void. *Bloom v. Franklyn Life Ins. Co.*, 97 Ind. 478; s. c., 49 Am. Rep. 469; *Douglas v. Knickerbocker Life Ins. Co.*, 83 N. Y. 492.

A forfeiture will not be enforced unless it is clearly demanded by established rules governing the construction of written agreements.

When a policy of insurance contains inconsistent or contradictory provisions, it is the rule that the provision most favorable to the assured will be adopted. *Mouler v. American Life Ins. Co.*, 111 U. S. 335; *National Bank v. Ins. Co.*, 95 U. S. 673.

Courts will construe a contract of insurance liberally, so as to give it effect rather than to make it void. Conditions which create forfeitures will be construed most strong against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy. *Carson v. Jersey Ins. Co.*, 43 N. J. L. 300; s. c., 39 Am. Rep. 584; *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Bliss Life Ins.*, § 385.

In *Burkhard v. Travellers' Ins. Co.*, 102 Penn. St. 262; s. c., 84 Am. Rep. 205, it was said: "When a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot after an acceptance by the other contracting party set up the narrow construction."

The policy before us having been presumably prepared by the company, and containing on its face inconsistent or ambiguous stipulations as to the consequences which should result from intem-

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perance, the meaning most favorable to the assured must be attributed to it. This rule is particularly applicable in a case like this, where a forfeiture is insisted upon. To hold otherwise would be to give a construction to the contract which would enable the insurance company to exercise its option, after having collected premiums, to insist upon a forfeiture or not according to its pleasure.

The consequence of intemperance was made the subject of a particular specific and separate stipulation in which no other subject is mentioned, and according to well-established rules of construction, when such is the case, the separate specific stipulation is to be preferred over a general stipulation inconsistent therewith.

As there was no averment in the answer that the insurance company had absolved itself from liability by cancelling the policy, according to the terms of the fifth stipulation contained therein, the demurrer to the first paragraph of the answer was correctly sustained.

The demurrer was substantially in the form of that considered in the cases of *Rennick v. Chandler*, 59 Ind. 354, and *Stone v. Stone*, 75 Ind. 235, and is subject to the same criticisms as were there made. It sufficiently appears however that it was addressed to each paragraph of the answer separately. *Mitchell v. Stinson*, 80 Ind. 324. It is therefore not a joint demurrer, as contended, to all of the several paragraphs of answer.

It is assigned for error that the court erred in overruling the demurrer to the second and third paragraphs of reply. Both of these replies are directed to the fourth, fifth, sixth and seventh paragraphs of answer.

Each of these paragraphs of answer refers to a stipulation which is found in the policy, to the effect that whether sane or insane, if the assured shall die by his own hand the policy shall be void.

The fourth paragraph of answer, which fairly represents all the others, charges in substance, that after the delivery of the policy, the assured voluntarily entered upon a course of dissipation, by an excessive use of spirituous and malt liquors as a beverage, whereby his mental and physical powers were enfeebled, and he was rendered less able to understand the nature and probable results of his own acts, and that while in such enfeebled condition, and without fully knowing the consequences of his acts, he procured and swallowed an excessive draught of alcoholic liquor, from the effect of which he died shortly thereafter.

The replies set up substantially, that the assured, prior to his death, from causes over which he had no control, became physically and mentally weak and diseased, and that he resorted to the use of spirituous liquors as a means of restoring his health; that during his physical and mental debility he accidentally, without any intention of destroying his life, took an overdose of whisky, from the effect of which he became sick and died; that the results which followed the use of whisky were not expected nor intended by the assured; that by reason of his weak and debilitated condition, the whisky had an unusual, accidental and unexpected effect upon the assured, causing him to sicken and die, when no such result was expected or intended.

On behalf of the appellant it is contended that because it is not denied that the assured voluntarily entered upon a course of dissipation, as charged in the answer, and because it is not denied that his weak and enfeebled condition was the result of such dissipation, the replies do not avoid the answer, notwithstanding the averments therein contained that the effect produced by the draught of whisky was unexpected, unintentional and accidental. It should be stated that it is averred in the second paragraph of the reply, that the assured did not use intoxicating liquors so as to impair his strength or destroy his health.

In the third paragraph, the averment is, that he became physically and mentally diseased and weak from causes over which he had no control.

Stipulations of the character here under consideration have been the subject of much discussion and of frequent judicial construction. It seems to be settled that such a clause in a policy of life insurance is a protection to the insurer, in case of voluntary and intentional self-destruction by the assured, whether sane or insane. *Begelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232; *Pierce v. Travellers' Life Ins. Co.*, 34 Wis. 389.

Such a clause has however no application to a case in which death resulted by accident or without intention or expectation, even though it was caused by the hand of the assured. Death resulting from accident, or from an act which at the time it was entered upon or engaged in was not expected or intended to produce that result, cannot be said to be within the meaning of the policy. *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317; s. c., 39

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Am. Rep. 660; *Pierce v. Travellers' Life Ins. Co.*, *supra*; *Burkhard v. Travellers' Life Ins. Co.*, *supra*.

The pleadings under consideration involve no question of insanity. It is not averred that the assured was insane. From causes over which he had no control, a state of mental and physical weakness resulted, and while in that state he took an overdraught of whisky without any expectation or intention of destroying his life. Death was therefore the result of an accident, and the policy is not avoided. The demurrer to the replies was properly overruled.

[Other matters omitted.]

Judgment affirmed.

FOLTS V. KERLIN.

(105 Ind. 281.)

Constitutional law — holding State and Federal offices.

Under the constitutional inhibition of holding more than one lucrative office at the same time, a person may not hold the salaried office of township trustee and postmaster at the same time.

THE opinion states the case.

T. F. Palmer and M. M. Still, for appellant.

A. W. Reynolds, E. B. Sellers and D. D. Dale, for appellee.

ELLIOTT, J. John G. Kerlin, the appellee, received a majority of the votes cast at an election held on the 7th day of April, 1884, for the office of trustee of Princeton township. The term of the office to which he was elected began on the 14th day of April, 1884, and on that day he entered into the office. At the time he was elected, he was the postmaster at the town of Seafield in that township, and was receiving, as such officer, a compensation of more than \$200 per annum; he did not vacate the office of postmaster, but on the contrary, he retained it, and was holding it at the time this action was instituted. The facts of which we have given a synopsis are stated formally and at length in the appellant's petition, to which the trial court sustained a demurrer.

Our Constitution contains a provision prohibiting a citizen from holding two lucrative offices, either Federal or State, at the same time. The provision to which we refer reads thus: "No person holding a lucrative office or appointment under the United States, or under this State, shall be eligible to a seat in the general assembly; nor shall any person hold more than one lucrative office at the same time, except as by this Constitution expressly permitted, provided, that offices in the militia to which there is attached no annual salary, and the office of deputy postmaster where the compensation does not exceed ninety dollars per annum, shall not be deemed lucrative; and provided, also, that counties containing less than one thousand polls may confer the office of clerk, recorder and auditor, or any two of said offices, upon the same person." There is in our minds no doubt that the Constitution applies to all lucrative National and State offices of whatsoever class, except deputy postmasters whose compensation does not exceed ninety dollars per annum, since any other ruling would render nugatory the plain words of the instrument and make the provision respecting deputy postmasters either meaningless or absurd.

It is quite evident that the framers of the Constitution intended that postmasters should be regarded as Federal officers, but on principle independent of the language of that instrument, there can be no contrariety of opinion upon this subject. They are officers within the definition given by the authorities. "An office," says the Supreme Court of the United States, "is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties." *United States v. Hartwell*, 6 Wall. 385.

In *Henly v. Mayor*, 5 Bing. 91, B&R, C. J., said: "In my opinion every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer." In various forms this definition is given in many cases. Case of *Wood*, 2 Cow. 29, note; *People v. Common Council*, 77 N. Y. 503; s. c., 33 Am. Rep. 659. But there are cases directly declaring that postmasters are public officers. *Rodman v. Harcourt*, 4 B. Monr. 224; *Hoglan v. Carpenter*, 4 Bush, 89; *Patterson v. Miller*, 2 Metc. (Ky.) 493; High Extra. Leg. Rem., § 95.

In all the decisions upon constitutional provisions similar to ours that we have been able to find, it is laid down for law that one who

holds a Federal office, great or small, to which compensation is attached, cannot at the same time be lawfully the incumbent of a lucrative office under the statutes of the State. *In re Corliss*, 11 R. I. 638; s. c., 23 Am. Rep. 538; *State v. De Gress*, 53 Tex. 387; *Davenport v. Mayor*, 67 N. Y. 456; *State v. Clarke*, 3 Nev. 566.

If the office of township trustee is a lucrative one within the meaning of the Constitution, the appellee had no right in it while holding the Federal office of postmaster, and that it is a lucrative office is settled by our decisions. *Dailey v. State*, 8 Blackf. 329; *Creighton v. Piper*, 14 Ind. 182; *State v. Kirk*, 44 Ind. 401; s. c., 15 Am. Rep. 239. Both offices the appellee could not hold, and from one or the other he must be ousted.

The State courts have authority to expel him from the office of township trustee, but not from the office held by appointment from the Federal government. Our courts cannot decide upon the right of an appointee of the National government, but they can decide upon the right of one asserting a title to an office under the laws of the State. Within the powers delegated to it the Federal government is supreme, and this necessarily carries the authority to determine upon the qualification of its officers and their right to hold office. *Rodman v. Harcourt*, *supra*; *Hoglan v. Carpenter*, *supra*. As our courts have no authority to expel an incumbent from a Federal office, they are powerless to control a man who attempts to defy our Constitution by holding both a Federal and a State office, unless they have authority to expel him from an office held under the laws of the State, notwithstanding the fact that he may have entered into the State office last. We entertain no doubt that our courts do possess power to oust a man from a State office who undertakes to hold it in defiance of our Constitution. This doctrine is ably and decisively declared in the case last cited. If a man persists in clinging to a Federal office, our courts can and will compel him to loosen his hold upon an office created by the State. If he perseveres in his effort to violate one fundamental law by holding two offices, the sure penalty will be the loss of that over which the State has jurisdiction. He may, if he will, surrender the Federal office and retain that created by the State, but he cannot retain both in defiance of the Constitution. If he elects to hold the Federal office he must surrender the State office. The courts will coerce obedience to the Constitution, and will not permit men to hold office in violation of its provisions.

It is doubtless the general rule that where a man accepts an office held under the State, he vacates another held under the same sovereignty. *Dailey v. State, supra*; *Lucas v. Shephard*, 16 Ind. 368; *Creighton v. Piper, supra*; *Howard v. Shoemaker*, 35 Ind. 111; *Cotton v. Phillips*, 56 N. H. 220; *Milward v. Thatcher*, 2 T. R. 81; *People v. Hanifan*, 96 Ill. 420; *Stubbs v. Lea*, 64 Me. 195; *Shell v. Cousins*, 77 Va. 328.

But the reason of the rule fails when applied to offices held under different sovereignties, and where the reason of the rule fails, so also does the rule. There is reason for the rule where the offices emanate from the same government, but none where the offices are created by different governments. The National law neither creates nor governs a State office; neither inducts the officer into office nor expels him from it; neither fixes his qualifications nor prescribes his disabilities. On the other hand the State law exerts no dominion over the Federal officer as an officer, neither prescribes his qualifications nor declares his disabilities, and it is therefore logically inconceivable that the acceptance of an office existing under a State law vacates an office existing under a National law. Where, as here, a man elected to a State office persists in retaining a Federal office, actually remains in it, enjoying its emoluments and discharging its duties, he does not in legal contemplation and certainly not in fact vacate it by entering into an office existing under the laws of the State, and for this plain reason the laws of the State do not operate upon Federal offices. Our laws do not extend to offices created by the general government, and no act that an officer acting under our laws can do can vacate an office upon which our laws do not operate. Nothing done under our laws can operate where our laws are without effect.

We must hold that a man can be expelled from a State office who persists in holding one given him by the Federal government, or we must concede that the courts of Indiana cannot control a citizen who assumes to hold office in direct violation of the Constitution. This concession will not be made.

Judgment reversed.

Petition for a rehearing overruled.

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HACKETT V. STATE.

(105 Ind. 288.)

Constitutional law — regulation of telephone companies.

The State may limit the price which telephone companies may charge for their patented facilities.

THE opinion states the case.

J. E. McDonald, J. M. Butler, A. L. Mason, T. A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, N. Williams, J. L. Thompson, and C. S. Holt, for appellant.

F. T. Hord, attorney-general, A. C. Harris, W. H. Calkins, C. Byfield and L. Howland, for State.

NIBLACK, C. J. On the 13th day of April, 1885, the legislature of this State passed an act, entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation, the tenor of which is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State shall be allowed to charge, collect or receive as rental for the use of such telephones, a sum exceeding \$3 per month where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall not exceed \$2.50 per month.

"§ 2. Where any two cities or villages are connected by wire operated or owned by any individual, company or corporation, the price for the use of any telephone for the purpose of conversation between such cities or villages shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

"§ 3. Any owner, operator, agent or other person, who shall charge, collect or receive for the use of any telephone any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offense, and on conviction shall be fined in any sum not exceeding \$25."

On the 27th day of July, 1885, Theodore P. Haughey requested the Central Union Telephone Company, a corporation organized under the laws of the State of Illinois, but owning and operating a telephone exchange, and system of telephone lines at the city of Indianapolis in this State, to rent him one telephone, to be used at his residence upon his farm, four and one-half miles from the company's telephone exchange, and two miles outside of the corporate limits of the city of Indianapolis, and to connect such telephone with the exchange by the erection of the necessary poles and wires. In response to this request, the company offered to rent to Haughey a hand telephone and magneto bell, and to connect them with its exchange, and to furnish exchange service from 7 o'clock A. M. until 6 o'clock P. M., each day, for \$3 per month, the company to have the right to place other subscribers upon the same line. But Haughey declined to accept that offer, and instead entered into a contract with the company for the use of "one battery transmitter and one magneto telephone," and "the necessary appliances for connecting them with the exchange," upon certain terms and conditions named in the contract, for which he agreed to pay the company the sum of \$33.50 for each quarter, or \$11.16 $\frac{2}{3}$ per month. The contract says:

The above total sum is based upon the charges itemized as follows:

- "Rental of one magneto telephone and one battery transmitter (two telephones), at the rate of \$20 per annum
- "Labor and service charges for switching, construction and maintenance charges for lines, batteries, central office apparatus, magneto bell and other appurtenances, at the rate of..... 114 " " "

The telephone company built the line and furnished the equipments for the use of Haughey, called for by its contract with him.

At the expiration of the first three months after the contract went into effect, the appellant, John E. Hockett, acting as the district superintendent and general agent of the company at Indianapolis, demanded of and received from Haughey the sum of \$33.50, claimed to be due under the contract for the latter's use of the line and equipments therein provided for, during the preceding three months.

An information was thereupon filed against Hockett, charging him with a violation of the provisions of the act of the legislature,

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hereinabove set out, and upon proof of the matters above stated, with others of a formal, incidental, or a merely collateral character, the court below found him guilty of having charged more for the use of a telephone than the law permitted him, as well as the company he represented, to do, and after overruling a motion for a new trial, adjudged that he pay a fine as a penalty for the commission of a criminal offense.

It was shown at the trial that the articles furnished to Haughey as a telephone equipment, as well as all the other mechanical contrivances used by the company in the transmission of words and sounds over its wires, are patented articles, and that the company holds the right to use these patented articles by assignment either direct or remote from the patentee.

It is first and most earnestly contended, that as the articles used by the company as above are patented under the Constitution and laws of the United States, the legislature of a State has no power to limit the price, use, sale or rental value of such articles, and that as a consequence, all acts of a State legislature of the class to which the one before us belongs, are inoperative and ineffectual for any practical purpose. Conceding the force as well as the plausibility of many of the arguments and illustrations used by counsel, the ready, and indeed, inevitable answer is, that the question thus presented ought no longer to be regarded as an open question. There is a reserved, and at the same time, well recognized power affecting their domestic concerns remaining in all the States which the government of the United States cannot and has seldom attempted to invade. This power is so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized in particular cases are quite numerous, as well as various in their application to our complex system of government. This reserved power is usually, though perhaps not always accurately, denominated the police power of a State, and embraces the entire system of internal State regulation, having in view not only the preservation of public order and the prevention of offenses against the State, but also the promotion of such intercourse between the inhabitants of the State as is calculated to prevent a conflict of rights, and to promote the interests of all. Cooley Const. Lim. 572.

It is a power inherent in every sovereignty, and is in its broadest

sense nothing more than the power of a State to govern men and things within the limits of its own dominion. *License cases*, 5 How. 504, 582.

It extends to the promotion of the lives, limbs, health, comfort and convenience, as well as the property, of all persons within the State. It authorizes the legislature to prescribe the mode and manner in which every one may so use his own as not to injure others, and to do whatever is necessary to promote the public welfare, not inconsistent with its own organic law. *Thorpe v. R. & B. R. Co.*, 27 Vt. 140; s. c., 62 Am. Dec. 625.

In 1867 letters-patent were issued to one DeWitt, for a discovery in the manufacture of a quality of oil known as "Aurora oil," and one Patterson became the assignee of the right conferred upon DeWitt by his letters-patent. Under a system of inspection, provided by the laws of Kentucky, some casks containing this Aurora oil were branded "unsafe for illuminating purposes," and notwithstanding a statute of that State making it a penal offense to sell oil thus branded, Patterson sold the casks of oil in question to one Davis. Patterson was thereupon indicted, tried and convicted in one of the Kentucky courts for the alleged unlawful sale of these condemned casks of oil. This judgment convicting Patterson of a criminal offense having been affirmed by the Court of Appeals of that State, the cause was taken to the Supreme Court of the United States to test the validity of the statute under which Patterson was so convicted, as a restraint upon the sale of a commodity covered by letters-patent from the United States. Upon a review of all the questions involved, the validity of the statute was maintained, and the judgment of the Court of Appeals was in all things affirmed. See *Patterson v. Kentucky*, 97 U. S. 501.

The court held in that case, and as we have no doubt correctly, that all that the letters-patent secured was the exclusive right in the discovery, and that the right thus secured was an incorporeal right, and hence without "tangible substance;" that the right to sell the oil was not derived from the letters-patent, but existed and could have been exercised before the issuing of such letters, unless prohibited by some local statute; that because the patentee acquired a monopoly in his discovery, and was hence secure against interference, it did not follow that the tangible property which came into existence by the application of the discovery was beyond the control of State legislation; that on the contrary, the right of property in the

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physical substance, which is the fruit of the discovery, is altogether distinct from the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright itself; that hence the right conferred upon the patentee and his assigns to make, use and vend the corporeal article or commodity brought into existence by the application of the patented discovery must be exercised in subordination to the police or local regulations established by the State. The doctrine of that case was approved and followed in the more recent case of *Webber v. Virginia*, 103 U. S. 344, and has the support, either in direct terms or in principle, of numerous other carefully considered cases. *Patterson v. Commonwealth*, 11 Bush, 311; s. c., 21 Am. Rep. 220; *State v. Telephone Co.*, 36 Ohio St. 296; s. c., 38 Am. Rep. 583, and note; *Jordan v. Dayton*, 4 Ohio, 295; *Fry v. State*, 63 Ind. 552; *People v. Russell*, 49 Mich. 617; s. c., 43 Am. Rep. 478; *Thompson v. Staats*, 15 Wend. 395; *Martinetti v. Maguire*, Deady, 216; *Vannini v. Paine*, 1 Harrington, 65; *License Tax cases*, 5 Wall. 462; *United States v. De Witt*, 9 Wall. 41; *Railroad Co. v. Husen*, 95 U. S. 465; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Brechbill v. Randall*, 103 Ind. 528; s. c., 52 Am. Rep. 695; *Palmer v. State*, 39 Ohio St. 236; s. c., 48 Am. Rep. 429; *Western U. Tel. Co. v. Pendleton*, 95 Ind. 12; s. c., 48 Am. Rep. 692; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

While therefore it is true that letters-patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use and vend the tangible property brought into existence by a practical application of the discovery covered by the letters-patent, for a limited time, it is not true that such exclusive right authorizes the making, using or vending of such tangible property in a manner which would be unlawful except for such letters-patent, and independently of State legislation and State control.

It is next contended that the Central Union Telephone Company was organized, and has so far been conducted as an ordinary business investment, and is in its methods as well as in its relations to its patrons and subscribers a merely private enterprise, no more subject to legislative control than any other private business with which a considerable number of persons have become either directly or indirectly connected; that consequently the act of the legislature, under which this prosecution was instituted, is inoperative

and void as a restraint upon the company in its charges for the rental and use of its instruments.

The telephone is one of the remarkable productions of the present century, and although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed toward the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to a public use. *State v. Nebraska Telephone Co.*, 17 Neb. 126; *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; *State v. Telephone Co.*, *supra*; *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 49 Conn. 352; s. c., 44 Am. Rep. 237, n.

It is now a well-settled legal proposition that property thus devoted to a public use becomes a legitimate subject of legislative regulation and control. In recognition of that doctrine the case of *Munn v. Illinois*, 94 U. S. 113, has become a leading case.

It was in general terms held in that case, that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use to which he has so devoted his property, and that he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion, the court said it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and in so doing, to fix a maximum of charges to be made for services rendered, accommodations extended and articles sold. This case has

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been the subject of much unfriendly comment and has encountered some very sharp criticism, but its authority as a precedent remains unshaken.

This State regulation and control of property devoted to a public use is not the taking of property for a public purpose within the meaning of section 21 of article 1 of the Constitution of this State. Nor is such regulation and control an interference with the guaranteed rights of the citizen in private property. As bearing generally upon the subjects lastly above referred to, see also the cases of *Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155; *Chicago, etc., R. Co. v. Ackloy*, 94 U. S. 179; *Winona, etc., R. Co. v. Blake*, 94 U. S. 180; *Railroad Co. v. Richmond*, 96 U. S. 521; *Railroad Co. v. Fuller*, 17 Wall. 560; *Olcott v. Supervisors*, 16 Wall. 678; *Ruggles v. Illinois*, 108 U. S. 526; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Ruggles v. People*, 91 Ill. 256; *Illinois Central R. Co. v. People*, 108 U. S. 541; *Alnut v. Inglis*, 12 East, 527; *Mayor, etc., of Mobile v. Yuille*, 3 Ala. 137; s. c., 36 Am. Dec. 441; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 343; *Bolt v. Stennett*, 8 T. R. 606; *Com. v. Duane*, 98 Mass. 1; *Com. v. Tewksbury*, 11 Metc. 55; *Com. v. Alger*, 7 Oush. 53; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Slaughter-House cases*, 16 Wall. 36; *Sharpless v. Mayor, etc.*, 21 Penn. St. 147; *Grant v. Courtier*, 24 Barb. 232; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Mass.*, *supra*; *Ogden v. Saunders*, 12 Wheat. 212; *Standard Oil Co. v. Combs*, 96 Ind. 179; s. c., 49 Am. Rep. 156; *Western U. Tel. Co. v. Pendleton*, *supra*; *Indianapolis, etc., R. Co. v. Kercheval*, 16 Ind. 84; *Foster v. Kansas*, 112 U. S. 201; *Brechbill v. Randall*, 102 Ind. 528; s. c., 52 Am. Rep. 698; *Fry v. State*, *supra*; *Toledo Agr'l Works v. Work*, 70 Ind. 253; *West Virginia, etc., Co. v. Volcanic Oil Co.*, 5 W. Va. 382; *State v. Perry*, 5 Jones L. 252; s. c., 69 Am. Dec. 768; *Attorney-General v. Railroad Companies*, 35 Wis. 425.

The obvious deduction from what has been said, as well as from the authorities cited, is that the power of a State legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete.

It was made to appear by evidence that there are several instruments more or less in use by telephone companies, each known as a "telephone," one as the hand telephone, another as the box tele-

phone, a third as the switchman's head telephone, and the fourth as the battery transmitting telephone; that the first, known also as the Bell hand or magneto telephone, consists of a bar magnet with a helix of wire at one end, a diaphragm suitably mounted in front of the helix, and a hard rubber case supporting the whole, with combined poles for making connection with a cord from twenty-four to thirty inches long, and through it with a magneto bell; that this telephone will both transmit and receive sounds or words carried electrically over a connecting wire; that this instrument was at first, with the assistance only of the magneto or call bell, used in transmitting as well as in receiving telephonic messages; that some time after this Bell hand telephone had thus come into use, the battery transmitting telephone, known as the Blake transmitter, was introduced and generally accepted as a very decided improvement in the transmission of words and sounds over wires used by telephone companies, words and sounds being transmitted through it in a louder tone and with greater effect than through the Bell hand telephone; that for some time previous to the 13th day of April, 1885, this Blake transmitter had come into general use in the transmission of messages with that class of patrons and subscribers who desired the best available telephonic service; that since the Blake transmitter had come into general use as stated, the Bell hand telephone had been chiefly used as a receiver of messages, only a comparatively few persons continuing to use it also for transmitting purposes; that on the day last named, and for a considerable time previously, a fully equipped organization for the convenient and ready transmission and reception of messages over telephonic wires, consisted, as it still consists, of a Bell hand telephone and cord, a Blake transmitter, a magneto or call bell, a cell of battery, a backboard and a battery box; that the instruments thus constituting a telephonic equipment have been and still are only rented by telephone companies to their patrons and subscribers, the latter not being allowed to either purchase or own any of such instruments.

Upon the facts thus disclosed by the evidence, it is in the third place contended that the act of April 13, 1885, under consideration, only limits the price to be charged to three dollars per month when one instrument, known as a telephone, is rented to a patron or subscriber, and does not apply to a case like the one before us, where two instruments, each answering to that name, are for his greater convenience rented to the same person to be used together,

and that consequently the facts of this case do not bring it within the penal provisions of that act.

In a general sense the name "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tube used in conveying the sound of the voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or discs, by which the voice is carried to a distant point, is strictly speaking a telephone. But since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires. In a secondary sense however, being the sense in which it is most commonly understood, the word "telephone" constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety, ordinarily used in the transmission, as well as in the reception of telephonic messages. In this latter sense the Central Union Telephone Company, in behalf of which the appellant stands as the representative in this proceeding, has very significantly sanctioned the use of the word "telephone."

In August, 1885, it published a book for the use of its patrons and subscribers, entitled "Indianapolis Telephone Directory," in which those having the use of its telephonic instruments were instructed as follows: "Call by numbers. When through talking ring out. Make all complaints to the chief operator—call No. 1,000. Help each other by answering your telephone promptly. Do not allow non-subscribers to use your telephone. It is unjust to other subscribers, impedes the service and is a violation of your contract."

These were a substantial repetition of instructions issued by the Western Telephone Company, one of the predecessors of the Central Union Telephone Company in June, 1883. In these instructions the "telephone" is plainly referred to as an organized apparatus—an institution—and not as a single instrument. In this use of the word "telephone," the telephone companies in question simply adopted and emphasized what had already been generally accepted as the proper meaning of that word in the connection in which it was so used by them.

Before the great discovery of Prof. Morse in telegraphy, the power of electricity to give a sudden and mysterious impulse to a

suspended wire was well understood among those most familiar with experiments in electrical science. His discovery consisted in the invention of an instrument, or machine, which utilized that power of electricity, and thereby enabled him to send intelligible messages over suspended wires to remotely distant places. When that instrument or machine first came into use, the word "telegraph" was understood to more particularly refer to it as the thing best known by that name; but since that time a much wider and more comprehensive meaning has been attached to that word.

The "telegraph" is now usually accepted, and in common parlance is generally understood as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: *First*. A battery or other source of electric power; *secondly*, of a line-wire or conductor for conveying the electric current from one station to another; *thirdly*, of the apparatus for transmitting, interrupting, and if necessary, reversing the electric current at pleasure; and *fourthly*, of the indicator or signaling instrument. See Imperial Dictionary, title "Telegraph."

In the respect indicated, the varying meanings of the word "telephone" are analogous to those applied to the word "telegraph," there being very much in common between the two systems of telephony and telegraphy. In reaching a conclusion as to what is generally understood by the use of the word "telephone," we have been governed partly by the information judicially within our reach, and in other respects by the evidence. The word having become a term of art, evidence was admissible to explain its proper meaning. 1 Greenl. Ev., § 280; Whart. Ev., §§ 961 to 972.

In view of the condition of things as shown to have existed on the 13th day of April, 1885, we feel constrained to hold that the word "telephone," as used in the act of that date, was intended to designate, and in fact really referred to an apparatus composed of all the usual and necessary instruments for the convenient and ready transmission and reception of telephonic messages, and not to a single instrument only.

There was evidence at the trial tending to prove that the Central Union Telephone Company cannot supply the facilities to Haughey provided for in its contract with him for three dollars per month, without actual and very serious loss, and arguing that the legislature cannot be presumed to have intended to inflict injustice upon any person or corporation, it is insisted we ought to take the com-

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pany's liability to sustain a great loss in a certain contingency into consideration in determining the legislative intention in enacting the statute in question in this case. This argument is largely based upon the assumption that the company was not at liberty to decline to extend its line to Haughey's farm upon his request that such an extension should be made, and that it will be compelled to maintain such extension so long as Haughey may require it to be maintained, independently of any contract with him on the subject. This assumption is however not well founded. There is nothing in the act of the legislature under review, or contained in any other statutory or common-law regulation applicable to the subject, to which our attention has been called, which requires a telephone company to construct a new line against its will or to maintain an old line longer than it may feel inclined to do so in the exercise of a legitimate business discretion. Besides the power of the legislature to pass the act in question being conceded, this court cannot sit in judgment upon either the justice or the expediency of the enactment of such a law. If the law shall prove to be either unjust or inexpedient in its operation, whether upon persons or corporations, the appeal must be to the legislature and not to the courts.

The judgment is affirmed with costs.

Judgment affirmed.

SHULAR V. STATE.

(105 Ind. 200.)

Criminal law — view of premises — prisoner's presence at.

Where the court in a criminal case orders a view of premises by the jury at the prisoner's request, it is no error to allow them to go without the prisoner in absence of any request on his part to accompany them.

CONVICTION of manslaughter. The head-note states the point.

W. H. Thompson, W. B. Herod and J. West, for appellant.

A. B. Anderson, F. M. Howard, G. W. Paul, J. E. Humphries and W. W. Thornton, for State.

ELLIOTT, J. [Omitting other points.] The court, on the motion of the appellant, sent the jury to inspect the premises where the homicide was committed, and did not direct that the defendant should be present when the inspection was made; but no request was made by the defendant that he should be allowed to be present, nor was there even a suggestion to the court that he desired to accompany the jury; nor did he, although he was present when the jury left the courtroom, ask that he be permitted to go with them; nor did he object in any manner to their making the inspection. But the record shows more than this, for it shows that the court directed the attention of the defendant and his counsel to the statute, and stated that it required the consent of the parties, and inquired if they consented to the order, to which inquiry, as the record recites, the defendant's counsel responded "by renewing their request, and defendant indicated his assent."

Many authorities are cited by counsel in support of the general principle that the defendant must be present when evidence is given against him, and that this is the general rule we have no doubt; but the question here is whether the case is within the rule, not what the general rule is. Whether the case is within this general rule must depend upon the provisions of our statute and the conduct of the appellant.

Our statute provides that "whenever, in the opinion of the court and with the consent of all the parties, it is proper for the jury to have a view of the place in which any material fact occurred; it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the officer and the person appointed to show them the place, shall speak to them on the subject connected with the trial."

This statute does not intend that the view of the premises where a crime was committed shall be deemed part of the evidence, but intends that the view may be had for the purpose of enabling the jury to understand and apply the evidence placed before them in the presence of the accused in open court. Deferring for the present the consideration of the authorities, and reasoning on principle, we shall have no difficulty in concluding that the statute does not intend that an inspection of a place where a crime was committed shall be taken as evidence. It cannot be seriously doubted that

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evidence can only be delivered to a jury in a criminal case in open court, and unless there is a judge or judges present, there can be no court. The statute does not intend that the judge shall accompany the jury on a tour of inspection; this is so obvious that discussion could not make it more plain. The jury are not, the statute commands, to be spoken to by any one save by the officer and the person appointed by the court, and they are forbidden to talk upon the subject of the trial. It is the duty of the jurors to view the premises, not to receive evidence, and nothing could be done by the defendant, or by his counsel, if they were present, so that their presence could not benefit him in any way, nor their absence prejudice him. The statute expressly provides who shall accompany the jury, and this express provision implies that all others shall be excluded from that right or privilege. It is quite clear from these considerations, that the statute does not intend that the defendant or the judge shall accompany the jury, and it is equally clear that the view obtained by the jury is not to be deemed evidence.

Turning to the authorities we shall find our conclusion well supported. The statute of Kansas is substantially the same as ours, except that it does not, as ours does, require the consent of all the parties, and in a strongly reasoned case it was held that it was not error to send the jury unaccompanied by the defendant to view the premises where a burglary had been committed. BREWER, J., by whom the opinion of the court was prepared, said, in speaking of the statute: "Nothing is said in it about the presence of the defendant, the attorneys, the officers of the court, or the judge. On the contrary, the language seems to imply that only the jury and officer in charge are to be present. The trial is not temporarily transferred from the court-house to the place of view. They are 'to be conducted in a body while thus absent.' This means that the place of trial is unchanged, and that the jury, and the jury only, are temporarily removed therefrom. Just as when the case is finally submitted to the jury, and they 'retire for deliberation,' there is simply a temporary removal of the jury. The place of trial is unchanged. And whether the jury retire to the next room, or are taken to a building many blocks away, the effect is the same. In contemplation of law the place of trial is not changed. The judge, the clerk, the officers, the records, the parties, and all that go to make up the organization of the court remain in the courtroom." *State v. Adams*, 20 Kan. 311.

The keenest scrutiny will disclose no infirmity in this reasoning, and it is in close agreement with that of our own court. In *Jeffersonville, etc., R. Co. v. Bowen*, 40 Ind. 545, this court overruled the case of *Evansville, etc., R. Co. v. Cochran*, 10 Ind. 560, and adopted the views of the Supreme Court of Iowa, expressed in *Close v. Samm*, 27 Iowa, 503. That court, in speaking of a statute similar to ours, said: "It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby the more intelligently to apply the testimony to the issue on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error, if any, could be afforded either party." The doctrine of *Close v. Samm, supra*, was again expressly approved in *Heady v. Vevay, etc., Turnp. Co.*, 52 Ind. 117, and it was said: "It results that the impression made upon the minds of the jurors does not constitute a part of the evidence in the cause." The case of *Jeffersonville, etc., R. Co. v. Bowen, supra*, was approved in *Gagg v. Vetter*, 41 Ind. 228; s. c., 13 Am. Rep. 322, and in *City of Indianapolis v. Scott*, 72 Ind. 196. In the case last cited it was said: "Perhaps, strictly speaking the jury had no right to do any' thing more than to view the premises, thereby to enable them the better to apply the evidence given upon the trial."

Counsel refer us to *Carroll v. State*, 5 Neb. 31, where a different view is taken, but we cannot yield assent to that decision. It is not a carefully considered case; not a single authority is cited, and there is no reasoning in support of the conclusion reached. The court there quote the statute and say: "This should be done in the presence of the prisoner, unless he decline the privilege, as he is entitled to have all the evidence received by the jury taken in his presence." Nothing more is said upon the subject, and the entire question is thus summarily disposed of. If our decisions are correct in holding that the view of the premises taken by the jury does not constitute evidence, that of the learned court from whose decision we have quoted must be wrong. In our investigation we have found two other cases which deserve a brief notice. In *State v. Bertin*, 24 La. Ann. 46, the jury were permitted to inspect the place where a burglary had been committed, and a witness for the prosecution was directed to accompany them and point out to them

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places marked on a diagram, and this was held to be error. We need only say of that case, that the permission given a witness to explain a diagram to the jury was permission to give evidence in the absence of the accused, and that there was not, in Louisiana, any statute allowing a jury to make an inspection. These two characteristics plainly mark the difference between that case and this. The case of *Benton v. State*, 30 Ark. 328, is not so easily disposed of, but we think that it falls into the same error as the court did in *Carroll v. State*, *supra*, of regarding the inspection of the jury as evidence. If it is not evidence, and so our cases declare, the ground falls away from the assumption upon which the whole argument of the case rests, and we concur with the court in *Adams v. State*, *supra*, in declining to assent to it. *Benton v. State*, *supra*, is however addressed to the constitutional phase of the subject, of which we shall hereafter speak, and does not consider the effect of such a statute as ours. It cannot therefore be deemed an authority upon the construction and effect of the statute, since it does not profess to discuss that subject. Mr. Wharton, in a single sentence, disposes of the question, citing the case of *Benton v. State*, *supra*, and of course must be understood as referring to the procedure in jurisdictions where there is no statute regulating the subject. Whart. Crim. Law (7th ed.), § 3160.

Thus far we have considered the question immediately under examination without reference to the important provision of our statute, that the view can only be ordered upon "the consent of all the parties," as well as without reference to the important fact that the appellant himself requested that the jury be directed to view the premises where the homicide was committed. As the defendant asked the benefit of the provisions of the statute, he must take the benefit just as the statute gives it. In discussing, as we shall presently do, the constitutional phase of the question, we shall refer to authorities which fully sustain this proposition. The statute here under discussion grants a privilege upon conditions that only the persons designated by the court shall accompany the jury, and the defendant has no right to assail the action of the court in obeying the provisions of the statute which he himself invoked. The reasoning of the court in *People v. Bonney*, 19 Cal. 426, forcibly applies to the phase of the question which we are here discussing, as well as to other questions in the case. It was there said: "The court had the discretion to permit the jury to view these physical

objects; and this was neither in contemplation of the act or otherwise any part of the trial. It was rather a suspension of the trial to enable the jury to view the ground, etc., that they might better understand the testimony. We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with acts, observations or conclusions of the jury. If he had desired to see the ground that he might be assisted in his defense by the knowledge thus obtained, possibly the court would have granted him the privilege; but the fact that the jury went upon the ground without being accompanied by him is no good reason for setting aside the verdict, especially as he neither made objection nor asked permission to accompany them at the time."

We come now to the constitutional phase of the question. We are to be governed by the provisions of our State Constitution, and are not controlled by the Federal Constitution, for the reason that the procedure in trials for offenses against the laws of the State is not governed by the provisions of the National Constitution except in cases where the States are named. This is settled law. *Butler v. State*, 97 Ind. 378; *State v. Boswell*, 104 Ind. 541, and authorities cited.

The provision of the bill of rights, conferring upon an accused the right to be confronted by the witnesses, is not infringed by a statute which confers upon a defendant the right to waive the privilege of being confronted in open court by the witnesses of the State. Two things concur in such a statute, the waiver by the accused, and the consent of the State that its citizens may make such a waiver. The rights secured by the Constitution are fundamental, but they may, where the statute so provides, be waived by the accused. "These rights may be separated into two classes, namely, those in which the public generally, and as a community, is interested, as well as the individual to whom they happen directly to apply in any particular instance; and those more in the nature of privileges, which are for the benefit of the individual alone, and do not in any way affect the general public, whether the individual avails himself of them or not." *Waiver of Constitutional Rights in Criminal Cases*, 6 Crim. Law Mag. 182.

The provision in the twelfth section of the bill of rights, securing to one accused of crime the privilege of being confronted by the witnesses, belongs to the second of the two classes named, and is a privilege which may be waived.

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In *Doggs v. State*, 8 Ind. 463, it was held that an objection that a deposition was taken without the consent of the accused was waived by a failure to make it in the trial court. The rule, as declared in the case of *Butler v. State*, *supra*, is that a defendant who elects to take depositions under the statute concedes to the State a like privilege, thus waiving his constitutional privilege. This doctrine is firmly supported by the authorities. In addition to those cited in that case may be cited the following: *Williams v. State*, 61 Wis. 281; *Wills v. State*, 73 Ala. 362; *State v. Wagner*, 78 Mo. 644; s. c., 47 Am. Rep. 131; *Hancock v. State*, 14 Tex. Ct. App. 392.

A striking illustration of the doctrine that a defendant in a criminal case may waive a constitutional right is supplied by those cases which hold that where an accused takes a new trial under a statute, he waives his right to insist upon the constitutional provision prohibiting a citizen from being put in jeopardy twice for the same offense.

...In *Veatch v. State*, 60 Ind. 291, the theory of the appellant was, that having been tried on an indictment charging him with murder, and having been convicted of manslaughter, he could not again be tried for murder, but the court denied the correctness of the theory, and held that he might be tried for the greater offense. It was there said, among other things: "Now it would seem that if a party takes a new trial in a criminal case, he takes it on the terms prescribed by the statute, and consents to be placed 'in the same position as if no trial had been had.'" Other cases assert a like doctrine. *Morris v. State*, 1 Blackf. 37; *United States v. Perez*, 9 Wheat. 579; *State v. Davis*, 80 N. C. 384; *Com. v. Arnold*, 6 Crim. Law. Mag. 61; *Lesslie v. State*, 18 Ohio St. 390; *Livingston's case*, 14 Grat. 592; *United States v. Harding*, 1 Wall. Jr. 127; *State v. McCord*, 8 Kans. 232; s. c., 12 Am. Rep. 469.

Another illustration is supplied by the cases which hold that where the statute so provides a jury trial may be waived. *Murphy v. State*, 97 Ind. 579; *In re Staff*, 6 Crim. Law Mag. 828.

The cases which hold that an accused may voluntarily waive his right to be present at the trial, or may forfeit it by misconduct, furnish still further illustrations of the doctrine we are considering. *McCorkle v. State*, 14 Ind. 39; *State v. Wamire*, 16 Ind. 357; *Fight v. State*, 7 Ohio, 180; s. c., 38 Am. Dec. 626; *Barton v. State*, 67 Ga. 653; s. c., 44 Am. Rep. 743; *United States v. Davis*,

6 Blatchf. 464. It would not be difficult to add many authorities to those we have cited, but we deem them amply sufficient to sustain our proposition that the statute under discussion is not unconstitutional.

Assuming, as we feel satisfied we may do, that the statute is constitutional, and assuming that we have correctly construed the statute, there can be no question that the trial court committed no error in sending the jury, at the appellant's request, to view the place where the homicide was committed.

Judgment affirmed.

BOYLE V. STATE.

(105 Ind. 499.)

Criminal law — dying declarations — opinion.

A dying declaration that the defendant had no reason, that the declarant knew of, for perpetrating the crime, is admissible.

CONVICTION of murder. The opinion states the case.

H. Colerick and W. S. Oppenheim, for appellant.

O. M. Dawson, prosecuting attorney, for State.

ELLIOTT, J. This case is here for the second time, *Boyle v. State*, 97 Ind. 322. One of the questions now argued by appellant's counsel was decided adversely to the appellant on the former appeal, and to that decision we adhere, not simply on the ground that it is the law of the case, but for the further reason that we believe the point was well decided. The question of which we are speaking, and of which we say that it was well decided on the former appeal, arises upon that part of the dying declarations of the deceased, wherein, in replying to the question: "What reason, if any, had the man for shooting you?" he said: "Not any that I know of, he said he would shoot my damned heart out." It was held that this was not the expression of an incompetent opinion, but was the statement of a fact, and we will not depart from that ruling. In the opinion given upon the former appeal, the following authorities were cited: *Wroe v. State*, 20 Ohio St. 460; *Rae v.*

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Scarfe, 1 M. & R. 551; *Roberts v. State*, 5 Tex. App. 141; Whart. Crim. Ev., § 4.

The gravity and importance of the case, it is thought, justify us in referring to authorities that have come to our notice since the delivery of our former opinion, and in briefly discussing the question, although we do not deem it necessary to enter upon a very full discussion of the subject.

In *Payne v. State*, 61 Miss. 161, it was held that the statement of the deceased that the defendant shot him "without cause," was not the expression of an opinion.

The statement of the deceased in *People v. Abbott*, 4 W. C. Rep. 132, was that "the man cut him with a knife, and that he had no cause for it whatever," and it was held to be the statement of a fact.

The statement of the dying person in *State v. Nettiebush*, 20 Iowa, 257, was in answer to a question whether the shot was accidental or intentional, and the answer was that "it was intentional." The evidence was held competent, but without any discussion.

In *Brotherton v. People*, 75 N. Y. 159, it was held that the statement that "he, the deceased, did not at first recognize the defendant, but when the latter drew his pistol and commenced his pranks he knew that it was the prisoner," was competent.

These authorities fully sustain our former ruling, and neither our own search nor that of counsel has resulted in finding any opposing decisions, except that of *Collins v. Commonwealth*, 12 Bush (Ky.), 271. That case disposes of the whole question in a single sentence, refers to one authority (1 Taylor Ev. 644) and that authority goes no further than to declare what is undoubtedly the general rule, that an opinion expressed in a dying declaration is not competent.

The decision in *People v. Fong Ah Sing*, 5 Crim. Law Mag. 64, is that it is improper to permit narratives of previous occurrences to be given in a dying declaration. What was there said by the court, and all that was said upon the subject was: "Dying declarations are restricted to the act of killing and to the circumstances immediately attending it, and forming a part of the *res gestæ*. When they relate to former and distinct transactions, they do not come within the principle of necessity on which such declarations are received." It is evident therefore that the case cited is not in point, and this is true of the other cases declaring a similar doctrine that are cited by counsel.

There is no substantial difference in the meaning of the word "cause" and the word "reason," as used in this instance in the dying declarations of the deceased. The jury could not have misunderstood the import of the word as used in the question addressed to the deceased, nor could he, for it is quite clear that it asked and required him to state what cause there was for the killing. If it be held that a dying man may not declare in general terms that there was no reason or no cause for the act of his slayer, then it will be practically impossible to ever get before the jury a statement on that point, for it is not possible for any one, much less a dying man, to state all the circumstances and facts upon which the conclusion that there was no cause or reason for the killing is based. The truth is that such a conclusion is not the expression of an opinion, but it is the statement of a conclusion of fact from observed facts, which under all authorities is competent in such a case as this. *Bennett v. Meehan*, 83 Ind. 566; s. c., 43 Am. Rep. 78; *Yost v. Conroy*, 92 Ind. 464; see p. 471; s. c., 47 Am. Rep. 156.

The cases all agree that dying declarations are admissible in a case where the evidence would be competent if the declarant were on the witness stand, and if the statements of the deceased can in any sense be deemed the expression of an opinion, the opinion belongs to that class which the authorities agree a non-expert witness may express without stating the facts on which it is based. *Bennett v. Meehan*, *supra*, and authorities cited, p. 569; *People v. Hopt*, 9 Pac. Rep. 407. The cases upon this subject are very numerous, but most of them will be found in *Lawson Expert and Opin. Ev.* 468-534; *Rogers Expert Test.* 6, 7, 8; *Best Ev.*, § 505; *Whart. Ev.*, § 512; and *Stephens Ev.*, art. 26.

It was not asserted in our former decision that an opinion found in a dying declaration is competent in a case where it would not be so if expressed by a witness on the stand. On the contrary, the general rule, that matters contained in a dying declaration are not competent unless they would be admissible if they came from the lips of a living witness, was declared and approved. *Montgomery v. State*, 80 Ind. 338; s. c., 41 Am. Rep. 815; *Binn v. State*, 46 Ind. 311.

What we decided in the former appeal and now reiterate, is that the evidence here objected to was competent because it would have been competent if it had come from a witness present in court. We need not discuss the general rules governing the admission of dying declarations — they are rudimentary — for the question here is not

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what the general rules are, but whether the declarant's statement was one that a witness on the stand would have been allowed to make. The declarations of Casey do not refer, as did the statement in *Montgomery v. State, supra*, to the purpose with which an act was done by another, but they simply declare that there was no cause for that act. A cause is often a fact, not merely an opinion, and it is here a fact.

The statement of the dying man was not an expression of an opinion as to the sufficiency of the cause or reason that the accused had for shooting, nor was it the expression of an opinion upon any subject, nor was it a narrative of a past occurrence, but it was the statement of a negative fact, namely, that there was no reason or cause whatever for the shooting. The declaration does not assume to be the expression of an opinion, but it professes to be and in truth is the statement of a fact, for if there was no reason or cause whatever, no opinion could be given as to its sufficiency or insufficiency. Whether there is any cause for an act must be a fact, but if it be conceded that there is a cause, then whether it was or was not adequate might well be deemed matter of opinion.

As we have suggested, negative facts can only be proved by a denial, since to enter upon a process of elimination and exclusion would lead to an almost endless examination. If a negative fact like that here under discussion cannot be proved by a general statement, then it would be necessary to enumerate every conceivable thing, and deny in detail that it existed. A practical science, such as the law is, requires no such procedure as that; if it did, it would be practically impossible to establish a negative fact. There are many instances in which what is in appearance a conclusion, but in reality a fact, may be stated in evidence. We suppose that it cannot be doubted that where the issue is whether a verbal agreement was entered into, it is competent to state in general terms that there was no agreement. So in a case where the question is whether liquor was or was not sold, it is proper for the defendant to deny the sale. So too it is perfectly competent for a party to state that he relied upon the representations of another. There are many cases, far too numerous to justify mention, in which it is proper to make a general statement in denial.

There is an essential difference between a statement denying a thing and one admitting the existence of a thing and qualifying its character. Thus to declare that liquor was sold, but not illegally,

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or that a man was struck, but not unlawfully, would so far as the qualifying words are concerned be a conclusion; if however these words should be struck out facts only would remain.

Whether the defense in a case of homicide is insanity, self-defense or an *alibi*, cannot change the rule governing the admission of dying declarations. There is not one rule for defenses of insanity, another for self-defense, and still another for the defense of an *alibi*, but there is one rule for all cases. The question in all cases is to be determined irrespective of the nature of the defense. It cannot affect the question in this instance that the defense was that of self-defense. It would violate settled principles of logic and of law to hold that the accused might by the character of his defense change the rule as to the admissibility of dying declarations.

The name of the person who committed the homicide, as well as the name of his victim, may be proved by the dying declarations of the latter. *Sylvester v. State*, 71 Ala. 17; *State v. Johnson*, 76 Mo. 181; *Lister v. State*, 1 Tex. App. 739.

[Omitting other points.]

Judgment affirmed.

ZOLLARS, J., dissented.

WALLACE V. LONG.

(105 Ind. 222.)

Statute of frauds—agreement to make child an heir.

Where a husband and wife, in consideration that a young girl should live with them as their child until their death, and render such service as she was able, orally agreed to make her their heir, and at their death to will her their entire estate which consisted at the death of the survivor of real estate and also of personal property exceeding \$50 in value, *held*, that the agreement was within the statute of frauds, and performance on the part of the girl would not take it out of the statute.*

CLAIM against an estate. The opinion states the case. The plaintiff had judgment below.

L. Wallace, E. A. Brown, L. M. Harvey, T. L. Sullivan and A. Q. Jones, for appellant.

J. E. Flores, A. W. Wishard and H. N. Spaan, for appellee.

* See *Woods v. Evans*, *post*.

MITCHELL, J. David D. Long, as guardian of Mollie Fette, filed a complaint in the nature of a claim against the estate of Maria Fette, deceased.

The substantial averments of the paragraph upon which the judgment rests are as follows: About the 22d day of February, 1871, the decedent and her husband, being childless, requested the plaintiff's ward, then about seven years old, a niece of the husband to live with them, and becoming much attached to her, they proposed and agreed at that time and afterward, "that if she would live with them during their life-time, and until the death of both, and become and act and do by them and toward them as their child and permit herself to be known and called as their child, and if she would respect and treat them as her parents, and do such work about their house and would render them such services and assistance in the care and keeping of their house and property as she was capable of doing, and if she would care for them and nurse them in sickness and would continue with them and live with them until their death they would treat and deal with and toward her as their child, they would make her their heir, and at their death, or at the death of the survivor of the two, they would will, bequeath and give her the entire estate of which they were possessed."

The ward accepted the proposal so made, and faithfully performed the agreement on her part. Charles Fette, the husband, died about March 15th, 1881, having left all his property to his widow. The agreement was then renewed between the ward and Mrs. Fette. The agreement was faithfully performed by the former until the death of the latter, which occurred December 17, 1883. It is averred that Mrs. Fette neglected to make the will according to the agreement and died intestate.

The claim is to recover the value of estate, estimated at \$6,000. Upon issues duly made there was a trial by a jury. The evidence tended to show that the intestate left real estate of the value of \$5,000, and a personal estate of about \$1,000 in value.

There was a verdict for the plaintiff for \$6,025, and over a motion for a new trial, judgment was entered on the verdict for \$6,000, the plaintiff having entered a remittur of \$25. Following the entry of judgment the records recite the following order, made by the learned judge who presided at the trial: "Inasmuch as this case is not without difficulty, it is ordered by the court that the defendant as administrator, do at once take and prosecute with rea-

sonable diligence an appeal to the Supreme Court of the State of Indiana."

Of the errors assigned here the only one discussed is the overruling of the motion for a new trial. This motion assigned as causes for a new trial, that the verdict was contrary to law and to the evidence, that it was not sustained by sufficient evidence, that the damages were excessive, and that the court erred in giving and refusing certain instructions.

It may be said, the evidence tends to establish the averments in the complaint, and if no legal impediment stood in the way it might fairly support the verdict.

The case proceeded upon the assumption that if the contract was proved substantially as alleged, and performance of it was shown on the part of the ward, an action for damages for the violation of the contract might be maintained, and that the measure of recovery to which she was entitled was the value of the real and personal estate of the intestate, irrespective of the actual value of the services rendered.

The argument for an affirmance of the judgment is predicated upon the affirmation of the following propositions:

1. That the action is for damages for the breach of an express parol contract.
2. That the contract is not within the statute of frauds.
3. That the measure of damages is the value of the estate agreed to be devised.

Upon the authority of *Frost v. Tarr*, 53 Ind. 390, it is conceded that an action for the specific performance of the contract is not maintainable, and upon the authority of that case, and the case of *Bell v. Hewitt*, 24 Ind. 280, and *Lee v. Carter*, 52 Ind. 342, it is insisted that the contract is clear of the statute of frauds, and that the measure of recovery should be the value of the estate.

A brief examination of the argument, and the cases above mentioned, seems to be required.

The concession that the contract cannot be specifically enforced involves the conclusion that it is within the inhibition of the statute. If the statute of frauds presents no obstacle to the enforcement of the contract, then so far as the record discloses, none exists. It cannot of course be denied, that if the contract had been in writing or if in pursuance of an oral contract, the plaintiff had been put in complete possession, and she had otherwise fully per-

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formed on her part, specific performance could have been enforced. It would then have presented a case analogous in principle to *Mauck v. Melton*, 64 Ind. 414. That was a case in which an oral contract was made, which provided that in consideration of board to be furnished and services to be performed a tract of land would either be conveyed or devised by will. The person agreeing to perform the service was put in possession of the land, and it was held, the services having been performed, that the contract would be specifically enforced.

It is true it was there said that the contract was not within the statute of frauds. In saying this nothing more was meant, in view of the facts, than that, by reason of the part performance of the contract, it had been taken out of the operation of the statute, and might therefore be specifically enforced. *Atkinson v. Jackson*, 8 Ind. 31; *Watson v. Mahan*, 20 Ind. 223; *Lafollette v. Kyle*, 51 Ind. 446; *Law v. Henry*, 39 Ind. 414; *Stater v. Hill*, 10 Ind. 176; *Moreland v. Lemaster*, 4 Blackf. 383; *Arnold v. Stephenson*, 79 Ind. 126.

The case of *Baxter v. Kitch*, 37 Ind. 554, involved a state of facts similar to *Mauck v. Melton*, *supra*. No possession having been delivered under the contract, the court said: "It is a contract for the sale of real estate; and to be made a sufficient foundation of the action, must have been in writing and signed by William Prickett, the deceased."

The case of *Neal v. Neal*, 69 Ind. 419, and *Johns v. Johns*, 67 Ind. 440, involved the principle here under consideration, and the holding in both was that the statute of frauds prevented the enforcement of the contract.

This much has been said to show that the only impediment in the way of a specific enforcement of the contract involved in this case is the statute of frauds.

When the title to property, either real or personal, is to be acquired by purchases the statute of frauds will operate upon and affect the contract in precisely the same manner, whether the consideration for the purchase is to be paid in services, money or any thing else. In either case, such a contract being in parol and entirely executory, cannot be enforced by either party, and it may be doubted whether a contract which is within the statute so as to be incapable of specific enforcement, has sufficient validity to support an action for damages by either party, unless the contract was induced under

or its violation is involved in some special circumstances of fraud or bad faith. *Barickman v. Kuykendall*, 6 Blackf. 21; *Ballard v. Bond*, 32 Vt. 355; *McCracken v. McCracken*, 88 N. C. 272; *Bender v. Bender*, 37 Penn. St. 419. The most that can be recovered in such a case is the value of what may have been paid or performed by one party in reliance upon such a contract, when the other refuses to perform. Reed Stat. Frauds, §§ 737, 761-2; *Day v. Wilson*, 83 Ind. 463; s. c., 43 Am. Rep. 76.

Where therefore services have been performed, or money paid, in consideration of property to be conveyed, if the contract is not enforceable by reason of the statute of frauds, the action is not on the special contract, but in the case of services performed, the action is on a *quantum meruit* to recover the value of the services. *Ham v. Goodrich*, 37 N. H. 185; *Emery v. Smith*, 46 N. H. 151; *Leslie v. Smith*, 32 Mich. 64; *Seymour v. Bennet*, 14 Mass. 266; 2 Reed Stat. Frauds, §§ 622, 623, and cases cited in notes; 2 Sutherland Dam. 453. In such a case the value of the services performed, and not the value of the property agreed to be conveyed, is the measure of damages.

Returning to the cases relied on, *Bell v. Hewitt*, *supra*, was an action on a special contract for services, to be compensated by a promised legacy of \$500. The contract involved the payment of a specified sum of money in a manner agreed upon. It was held, that as the contract was upon a definite consideration, and liable to be performed within one year, it did not come within the fifth subdivision of the statute of frauds, which inhibits the bringing of actions upon oral contracts, not to be performed within one year from the making thereof. There was in that case clearly no impediment in the way of the maintenance of an action on the contract to recover the stipulated wages. The case was followed in *Caviness v. Rushton*, 101 Ind. 500; s. c., 51 Am. Rep. 759, which involved the same principles.

The next case, *Lee v. Carter*, 52 Ind. 342, was decided, so far as it touches the question under consideration here, on a demurrer to the complaint, which was in the nature of a claim filed against the estate of one Carter. The substance of the complaint as set out in the opinion is, that Oline agreed with Carter that if the latter would take possession of the farm of the former, and clear and improve such portions as he might be able, and permit Oline to reside with him, do his mending, washing, and furnish his boarding,

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Oline would compensate him by devising all of his property, real and personal, to Carter or his children; that Carter took possession, cleared about 100 acres of the land, built fences, dwelling-house and stable, and otherwise fully performed his contract; that Oline died, leaving real and personal property of the value of \$8,600, without making the will or otherwise compensating Carter, who had performed services worth \$10,000.

The facts stated in the complaint showed such a part performance of the contract as clearly to take it out of the statute of frauds, and the complaint contained the statement of such facts as would have warranted the specific enforcement of the contract, as in *Mauck v. Melton, supra*, and the cases of that class cited above in connection with it, or possibly owing to the part performance averred, of making the contract the basis of an action for damages for its violation.

The complaint however was held good, and the contract was said to be clear of the statute of frauds, upon the authority of *Bell v. Hewitt, supra*. This, as it seems to us, was to some extent, at least, a misapplication of *Bell v. Hewitt, supra*. The contract to devise land and to bequeath personal property, exceeding \$50 in value, was clearly within the statute, and so far as it was withdrawn from its operation, if at all, it was by the acts of part performance which are set forth in the complaint. It does not appear what rule of damages was applied in the case.

The case of *Frost v. Tarr, supra*, arose out of the following facts: The father of Jane Tarr agreed with Simeon Frost that Frost should take Jane into his family, board, educate and clothe her as his own child until she was twenty-one years old, or was married, and that if she continued so to live with him and his family, and do the ordinary house-work usually performed by girls in house-keeping, he would bequeath to her a share equal in value to that given any of his children. It was alleged that she had fully performed, that Frost died without leaving her any thing by his will except \$50, and that he left an estate in real and personal property of the value of \$20,000, the greater portion of which he bequeathed to his son. She demanded judgment for one-sixth part of the estate, and for \$4,000 damages. It was there said by the court: "That the contract alleged is one the specific performance of which would not be decreed. But it does not follow, because a court will not decree specific performance of a contract, that there-

fore no action for damages will lie upon it when it has been violated. On the contrary, we think such action will lie, and that the damages in this case may be measured by the value of the portion which was promised, and that the plaintiff, in such case, is not limited to the value of the services performed, in the recovery." *Bell v. Hewitt, supra*, and *Lee v. Carter, supra*, were cited in support of the rule announced. It was said further, that there was nothing in "the question made as to the section of the statute of frauds which requires contracts not to be performed within a year from the making thereof to be in writing."

As respects other provisions of the statute of fraud, no question seems to have been made, and none was considered. The rule thus enunciated in respect to the right to sue for the violation of the contract, and what shall be the measure of recovery in such cases, seems to us, in view of the facts on which the cases cited in its support rest, and what has already been said in reference to them, to receive but incidental support from those cases.

That under the pressure which in this class of cases was brought to bear on the courts, this rule in one form and another prevailed in the earlier decisions in some of the States, is well known, but as is said by a learned author, "It gradually dawned upon the judges that there was no real difference between the land itself and its market value; and that allowing the plaintiff to recover the latter was, in effect, giving him specific performance of the contract." 2 Reed Stat. Frauds, § 738. The position has long since been abandoned in all the States with but one or two exceptions.

Of the earlier cases which sanctioned the rule of *Frost v. Tarr, supra*, to a degree were *Jack v. McKee*, 9 Penn. St. 235; *Bash v. Bash*, 9 Penn. St. 260; *McDowell v. Oyer*, 21 Penn. St. 417; *Malun v. Ammon*, 1 Grant Cas. 123. To these may be added, as lending some sanction to the doctrine, the cases of *Burlingame v. Burlingame*, 7 Cow. 92; *King v. Brown*, 2 Hill, 485, and *Hopkins v. Lee*, 6 Wheat. 109.

In overruling *Jack v. McKee, supra*, and the other cases following it, the Pennsylvania court said, in *Hertzog v. Hertzog*, 34 Penn. St. 418: "Whenever a departure from settled principles is shown by actual experience to have worked perniciously, to have occasioned wrong and hardship that were not anticipated, and to have placed the inheritance of families at the mercy of parol evidence, we think it the imperative duty of the court that made the depart-

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ure, to undo the mischief as far as possible, and to retrace their steps back to the old paths." It was further declared by the learned judge delivering the opinion in that case, that under the rule in *Jack v. McKee, supra*, a grandson, whose services at his own estimate did not exceed in value eighteen hundred dollars, had swept away the fairest portion of an estate, by a recovery of \$10,000, while in another case a domestic, whose services, had they been the subject of compensation, would have been comparatively insignificant, had under the rule above mentioned taken an entire estate from the right heir. A rule under which such disastrous and anomalous results are possible should not, in our opinion, be perpetuated, unless it finds its support in principles that are altogether beyond cavil.

The same year in which the Pennsylvania court overruled *Jack v. McKee, supra*, and other kindred cases, the New York court in *Erben v. Lorillard*, 19 N. Y. 299, disapproved of so much of *Burlingame v. Burlingame* and *King v. Brown, supra*, as lent any support to the doctrine under consideration.

It must, we think, be conceded that every provision of the statute of frauds exerts its influence upon contracts, such as we are here considering, to the same extent and with the same potency as upon other contracts for the sale and transfer of property, and if there is one class of cases more than another in which "a tight rein should be held," and the statute rigorously applied, it is that class in which it is proposed by parol to intercept from rightful heirs the transmission of estates. *Graham v. Graham*, 34 Penn. St. 475. That the evidence in this case tends to support the view that it was the purpose of the intestate to make provision for the plaintiff's ward by a will may be conceded, but as the agreement to do so was never manifested in writing, signed by her, and as it involved an agreement for the sale of real estate, and for the transfer of personal property exceeding in value \$50, such agreement was subject to the operation of the statute of frauds, equally with all other agreement for like sales. Because the agreement was not withdrawn from the operation of the statute by part performance, it cannot be specifically enforced, neither can it be the foundation of an action for damages. Browne Stat. Frauds, § 124.

It does however serve to rebut any presumption which otherwise might have obtained, that the services rendered were to have been gratuitously performed, or that they were performed under the

mere expectancy that the intestate would leave the plaintiff's ward a legacy. She is therefore entitled to recover the value of her services. *Jacobson v. Executors, etc.*, 3 Johns. 199; *Robinson v. Raynor*, 28 N. Y. 494; *Campbell v. Campbell*, 65 Barb. 639; *Reynolds v. Robinson*, 64 N. Y. 589; *Emery v. Smith*, 46 N. H. 151; *Sutton v. Rowley*, 44 Mich. 112; *Welch v. Lawson*, 32 Miss. 170; *Bender v. Bender*, 37 Penn. St. 419; *Maddison v. Alderson*, 8 App. Cases, 467; s. c., 35 Eng. Rep. 790; *Clark v. Davidson*, 53 Wis. 317; *Howard v. Brower*, 37 Ohio St. 402; Wood Frauds, §§ 221, 235.

Many other cases might be cited which support and illustrate the conclusions reached, but those referred to are deemed sufficient.

The value of the services is to be determined without any reference to the value of the estate of the intestate. But in estimating the value of the services, regard should be paid to the situation of the parties, the nature of the service required or performed. Allowance should be made too for the fact that under the circumstances, the presence and society of the plaintiff's ward may have been of sufficient value to compensate for her education, clothing and support.

To the extent that *Frost v. Tarr*, and *Lee v. Carter, supra*, announce a rule contrary to the conclusions herein reached, they may be considered as modified.

The judgment is reversed with costs, with directions to the court to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

PRICE V. JONES.

(105 Ind. 522.)

Negotiable instrument — not testamentary — consideration.

An old, infirm and diseased man, to pay a woman for boarding, nursing and caring for him, executed a written promise to pay her \$2,000, "one day after his death out of his estate." Held (1), a promissory note; (2) that the value of the services was conclusively fixed.

CLAIM against an estate. The opinion states the case. The plaintiff had judgment below.

Price v. Jones.

D. B. McConnell, R. Magee and S. T. McConnell, for appellants.

C. E. Taber, D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellee.

ELLIOTT, J. The claim of appellee against the estate of Benjamin Price, deceased, rests upon an account for boarding the deceased, and on an instrument executed by him reading as follows:

"\$2,000.

SEPTEMBER 18th, 1881.

"One day after my death, I promise to pay to the order of Nancy M. Jones two thousand dollars, to be paid out of my estate. For value received, without any relief from valuation or appraisement laws, with six per cent interest from date until paid, and attorney's fees.

"BENJAMIN PRICE."

The appellants insist that the instrument is an attempt to make a testamentary disposition of property, and is destitute of all legal efficacy. We cannot concur in this view. There is no attempt to make a testamentary disposition of property, for the instrument contains no provisions resembling those of a will. It is a promise to pay money. It differs from an ordinary promise in the single particular that it fixes the time of payment at a period subsequent to the promisor's death. It is nevertheless a promise to pay money, absolutely and at all events, to a person named, and it has therefore all the essential features of a promissory note. All the modern authorities agree that such instruments as the one before us are to be deemed the promissory notes of the person by whom they are executed. Story Prom. Notes, § 27; 1 Dan. Neg. Inst., § 46.

This case is easily discriminated from *Moore v. Stephens*, 97 Ind. 271, for here there is an express promise to pay a specified sum of money, and it is made in the form of a contract which imports a consideration; while in that case there was no promise, but simply a direction to pay, after the death of the person by whom the instrument was executed, a specified sum of money to the beneficiary named.

It is sufficient to file a note executed by a deceased person as a claim against his estate without any formal complaint. *Pulley v. Perfect*, 30 Ind. 379; *Hathaway v. Roll*, 81 Ind. 567.

The appellants introduced evidence of admissions of the appellee which tended to show that the note was intended to evidence a gift and nothing more, but in view of the explanations given by the

appellee, we cannot regard these admissions as conclusive. Nor can we regard the testimony upon this point as uncontradicted, for there is evidence tending to prove that the intestate was old, infirm and diseased; that he needed care and nursing; that he promised to pay for the care and nursing bestowed upon him, and that it was in the performance of this promise that he executed the note upon which the claim is founded.

It was for Benjamin Price, the appellant's intestate, to determine the value of appellee's services. He, better than those who are claiming his estate, knew what those services were worth, and his judgment of what was a fair compensation ought not to be set aside or disregarded. The rule is, that where parties agree upon a consideration, and it is one of an indeterminate value, the courts will not substitute their judgment for that of the contracting parties, but will uphold the contract. *Johnson v. Gwinn*, 100 Ind. 466, see p. 472; *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491, see p. 492; *Shade v. Creviston*, 93 Ind. 591, see auth. cited p. 594; *Wolford v. Powers*, 85 Ind. 294; s. c., 44 Am. Rep. 16. In the case last cited, very many of the decisions are collected, and some of them are directly in point here, especially the cases of *Earl v. Peck*, 64 N. Y. 596, and *Cowes v. Cornell*, 75 N. Y. 91; s. c., 31 Am. Rep. 428.

[Minor points omitted.]

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

O'BIBBEN V. MAXWELL.

(24 Kans. 8.)

Insanity — avoiding conveyances.

Where land is conveyed by an insane person before an inquisition and finding of lunacy, for a fair and reasonable consideration, without knowledge of the insanity or an advantage taken by the purchaser, the conveyance cannot be avoided if the consideration has not been returned, and no offer has been made to return it.

ACTION to set aside a conveyance. The head-note states the point. The defendant had judgment below.

Hackney & Asp, for plaintiff in error.

A. J. Pyburn, for defendant in error.

HORTON, C. J. As a general rule, the contract of a lunatic is void *per se*. The concurring assent of two minds is wanting. "They who have no mind cannot 'concur in mind' with one another; and as this is the essence of a contract, they cannot enter into a contract." 1 Pars. Cont. (6th ed.) 383; *Powell v. Powell*, 18 Kans. 371; s. c., 26 Am. Rep. 774. Notwithstanding this recognized doctrine, the decided cases are far from being uniform on the

subject of the liability or extent of liability of lunatics for their contracts. An examination of the cases upon the subject shows that there is an irreconcilable conflict in the authorities. We think however the weight of authority favors the rule that where the purchase of real estate from an insane person is made, and a deed of conveyance is obtained in perfect good faith, before an inquisition and finding of lunacy, for a sufficient consideration, without knowledge of the lunacy, and no advantage is taken by the purchaser, the consideration received by the lunatic must be returned, or offered to be returned, before the conveyance can be set aside at the suit of the alleged lunatic, or one who represents him.

WRIGHT, C. J., in *Corbitt v. Smith*, 7 Iowa, 60, thus states the law: "In the next place, a distinction is to be borne in mind between contracts executed and contracts executory. The latter, the courts will not, in general, lend their aid to execute where the party sought to be affected was at the time incapable, unless it may be for necessities. If on the other hand the incapacity was unknown — no advantage was taken — the contract has been executed, and the parties cannot be put *in statu quo* — it will not be set aside."

In *Behrens v. McKenzie*, 23 Iowa, 333, DILLON, J., said: "But with respect to executed contracts, the tendency of modern decision is to hold persons of unsound mind liable in cases where the transaction is in the ordinary course of business, is fair and reasonable, and the mental condition was not known to the other party, and the parties cannot be put *in statu quo*." In *Allen v. Berryhill*, 27 Iowa, 534; s. c., 1 Am. Rep. 309, it was decided that: "Where a contract made by an insane person has been adopted, and is sought to be enforced by the representatives of such person, it is no defense to the sane party to show that the other party was *non compos mentis* at the time the contract was made." COLE, J., dissenting, expressed his views as follows: "In every case of contract with a lunatic, which has been executed in whole or in part, the fact that the parties can or cannot be placed *in statu quo*, will have an important bearing in determining whether such contract shall stand. * * * When the parties cannot be placed *in statu quo*, and the contract is fair, was made in good faith, and without knowledge of the lunacy, it will not be set aside, even at the suit of the lunatic. And this, not because the contract was valid or binding, but because an innocent party, one entirely without fault or negligence, might,

and in the eyes of the law would, be prejudiced by setting it aside. Both parties are faultless, and therefore stand equal before the law, and in the forum of conscience. The law will not lend its active interposition to effectuate a wrong or prejudice to either; it will suffer the misfortune to remain where nature has cast it."

In *Bank v. Moore*, 78 Penn. St. 407; s. c., 21 Am. Rep. 24, a lunatic was held liable upon a note discounted by him at the bank; and Mr. Justice PAXSON, in delivering the opinion of the court, said, among other things:

"Insanity is one of the most mysterious diseases to which humanity is subject. It assumes such varied forms and produces such opposite effects as frequently to baffle the ripest professional skill and the keenest observation. In some instances it affects the mind only in its relation to or connection with the particular subject, leaving it sound and rational upon all other subjects. Many insane persons drive as thrifty a bargain as the shrewdest business man without betraying in manner or conversation the faintest trace of mental derangement. It would be an unreasonable and unjust rule that such persons should be allowed to obtain the property of innocent parties and retain both the property and its price. Here the bank in good faith loaned the defendant the money on his note. The contract was executed, so far as the consideration is concerned, and it would be alike derogatory to sound law and good morals that he should be allowed to retain it to swell the corpus of his estate."

Mr. Pomeroy, in his treatise on Equity Jurisprudence, says: "In general, a lunatic, idiot, or person completely *non compos mentis*, is incapable of giving a true consent in equity, as at law; his conveyance or contract is invalid, and will generally be set aside. While this rule is generally true, the mere fact that the party to an agreement was a lunatic will not operate as a defense to its enforcement, or as ground for its cancellation. A contract, executed or executory, made with a lunatic in good faith without any advantage taken of his position, and for his own benefit, is valid both in equity and at law. And where a conveyance or contract is made in ignorance of the insanity, with no advantage taken, and with perfect good faith, a court of equity will not set it aside, if the parties cannot be restored to their original position and injustice would be done." 2 Pom. Eq. Jur., § 946, p. 465. See also *Scanlon v. Cobb*, 85 Ill. 296; *Young v. Stevens*, 48 N. H. 133; s. c., 2 Am. Rep. 202; *Eaton*

Cribben v. Maxwell.

v. *Eaton*, 37 N. J. L. 108; s. c., 28 Am. Rep. 716; *Freed v. Brown*, 55 Ind. 310; *Ashcraft v. De Armond*, 44 Iowa, 229.

Applying the law thus declared to the case at bar, the District Court committed no error in overruling the demurrer. It appears from the pleadings that the conveyance was executed and delivered before an inquisition and finding of lunacy; that no offer was made to return to the purchaser his money paid for the conveyance of the land; and the answer sets forth good faith on the part of the purchaser; that he paid a fair and reasonable price for the land; that he had no knowledge or information of the lunacy of Olive E. Gribben, the ward of the plaintiff; that there was nothing in her looks or conduct at the time to indicate that she was of unsound mind, or incapable of transacting business; but on the contrary, that she was apparently in possession of her full mental faculties, and was then and had been for a long time prior engaged in the transaction of business for herself.

Our attention is called to the case of *Powell v. Powell*, *supra*, as decisive that the conveyance in question is void; but a consideration of the views above expressed and the authorities cited show that all the reasons to avoid a marriage with a lunatic do not apply in the case of a deed obtained in good faith from a lunatic, executed before an inquisition and finding of lunacy. We have examined fully the authorities on the other side of the question, and especially *Matter of De Silver*, 5 Rawle, 110; s. c., 28 Am. Dec. 645; *Gibson v. Soper*, 6 Gray, 279; s. c., 66 Am. Dec. 414; *Van Deusen v. Sweet*, 51 N. Y. 378; *Dexter v. Hall*, 15 Wall. 9.

Notwithstanding the recognized ability of the judges rendering these decisions, we are better satisfied with the doctrine herein announced.

The order and judgment of the District Court will be affirmed.

Judgment affirmed.

All the justices concurring.

Bliss v. Vedder.

BLISS V. VEDDER.

(24 Kans. 57.)

Execution — exemption — printing materials.

A printing press and printing materials, used in printing and publishing a weekly newspaper, from which the owner derives his principal support, personally arranging the matter and forms therefor, and performing such other work as is usually performed by the foreman of a weekly newspaper, are exempt from execution although he is not a practical printer, and most of the work is done by employees, and he is a partner in two other kinds of business, and is also a justice of the peace.*

REPLEVIN. The opinion states the case. The defendant had judgment below.

J. W. Rector, and W. P. Mudgett, for plaintiff in error.

Low & Smith, for defendant in error.

VALENTINE, J. This was an action of replevin, brought by J. W. Bliss against James S. Vedder, to recover certain personal property hereafter mentioned. The case was tried before the court without a jury, upon an agreed statement of facts. It appears from this agreed statement of facts that on December 19, 1882, the defendant, as constable, held an execution issued on an ordinary judgment for debt against the plaintiff, and then levied the same on one Washington Hoe printing press and certain type and other articles used in connection with the press in printing a weekly newspaper in Washington county, Kansas; that the plaintiff at and prior to that time was, and ever since has been a resident of Kansas, a married man, and the head of a family; that he was then engaged in the business of editing and publishing said newspaper, and was also engaged in carrying on a job-printing business in Washington in partnership with one Crosby, and was also in partnership with one Mudgett in the loan, land and insurance business, and was also a justice of the peace; but that the publishing of said newspaper was his main, chief and principal business, from which he derived his principal support; that all the property so levied on was then used in and about the publishing of said newspaper, and

* See notes, 25 Am. Rep. 63; 47 Am. Rep. 190

was necessary for that purpose; that the plaintiff was not a practical printer, and used said property through the agency of his employees, except that he himself edited the newspaper and made up the same and arranged the matter and forms for the same, and did the work on the same usually done by the foreman of a weekly country newspaper; that said property then belonged to the plaintiff; that after it was levied on and before the plaintiff began this action, he demanded the property of the defendant as being exempt from seizure, which demand was refused, and the plaintiff then brought this action of replevin and took and retained the property on an order of delivery. Upon these facts the court below held that the property was not exempt, and rendered judgment in favor of the defendant and against the plaintiff in the alternative for a return of the property or for \$78.95, the value of the property, and for costs. The plaintiff brings the case to this court for review.

Counsel for the defendant state the question for consideration in this court as follows: "The one and the only question for your consideration is as to whether a printing press and other materials used in the publishing of a weekly newspaper come within the provisions of subdivision 8, section 3, of our exemption law, when the owner of the same is not an operative, not a tradesman, not a 'practical printer,' but uses the same only by and through his employes, and this too in view of the fact that he is engaged at the same time in three other and distinct branches of business."

The exemptions provided for by said subdivision 8, section 3, of the exemption laws, are as follows: "Eighth. The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business; and in addition thereto, stock in trade not exceeding \$400 in value."

The defendant claims that the printing press and other materials levied on in this case are not exempt from execution, for the reasons that they are not tools or implements at all, or if tools or implements, then that they are not the kind of tools or implements contemplated by the exemption laws; that the plaintiff is not a mechanic or miner, or other like person—not even a printer, but is a professional man and an editor of a newspaper; that the articles in controversy are not used or kept for the purpose of carrying on the plaintiff's trade or business as a professional man or editor, but are used and kept for printing a newspaper; and that the articles

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in controversy are not used or operated exclusively by the plaintiff, but are used and operated, partially, if not wholly, by employees.

We think the articles are exempt. It does not appear that any of them are costly or complicated machinery, or such that they cannot be easily used or operated by hand, even if being costly or complicated or not easily used or operated by hand would take them out of the exemption laws. From the judgment rendered in the case it seems that the value of the property in the aggregate is only \$78.95, and there is no pretense anywhere that it is worth more than \$492. We think the articles in controversy are tools and implements within the meaning of the exemption laws. *Salle v. Waters*, 17 Ala. 482; *Prather v. Bobo*, 15 La. Ann. 524; *Patten v. Smith*, 4 Conn. 450; s. c., 10 Am. Dec. 166. See also, in this connection: *Jenkins v. McNall*, 27 Kans. 532, 533; s. c., 41 Am. Rep. 422; *Bequillard v. Bartlett*, 19 Kans. 382; s. c., 27 Am. Rep. 120; *Voorhees v. Patterson*, 20 Kans. 555; *Davidson v. Sechrist*, 28 Kans. 324; *Healy v. Bateman*, 2 R. I. 454; s. c., 60 Am. Dec. 94.

And the plaintiff is not a mere editor of a newspaper; he is also the publisher thereof; and the manual labor of publishing the same is not all done by employees, but he performs a considerable portion of the work himself; and the fact that the plaintiff performs some of the work by and through the agency of employees does not prevent the exemption laws from applying to the property and rendering the same exempt from execution. *Howard v. Williams*, 2 Pick. 80; *Dowling v. Clark*, 3 Allen, 570; *Rayner v. Whicher*, 6 Allen, 292; *Dowling v. Clark*, 1 Allen, 283.

Upon the claim of the defendant that printing presses and printing materials are not exempt from execution, he cites the following cases, among others: *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodward*, 10 Pick. 423; *Spooner v. Fletcher*, 3 Vt. 133.

These cases seem to hold that printing presses and printing materials are not "tools" within the meaning of their exemption statute. Now these cases may not be in conflict with the views expressed by us, for these cases relate to tools only, while our statutes relate to "tools and implements;" and the statutes of Massachusetts and Vermont may in other respects differ very materially from ours. But if these cases do conflict with the views we have expressed, then we must say that we cannot follow them. We have examined all the other cases cited by counsel. The principal authorities will

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be found cited in Thompson on Homestead and Exemptions, § 755 *et seq.*, and Freeman on Executions, 266 *et seq.* The decisions are as diverse as are the statutes upon which they are founded.

The judgment of the court below will be reversed, and the cause remanded with the order that judgment be rendered in favor of the plaintiff and against the defendant for the property in controversy, and for costs.

Judgment reversed.

All the justices concurring.

GERLACH V. SKINNER.

(34 Kans. 86.)

Contract—consideration illegal in part.

Where the plaintiff had purchased in this State, a lot and the building thereon, and a large quantity of intoxicating liquors and the fixtures of a bar in the building, for a gross sum of \$4,000, and no separate price was fixed or agreed upon for the lot, or intoxicating liquors, or the fixtures, and the contract as to the liquors and fixtures was in contravention of the prohibitory liquor law, *held*, that it was wholly void, and could not be specifically enforced.

ACTION for specific performance. The opinion states the facts. The plaintiff had judgment below.

Waters & Chase, for plaintiff in error.

Ellis Lewis and *Wm. Thompson*, for defendant in error.

HORTON, C. J. [Omitting a question of practice.] The demurrer to the evidence of plaintiff below should have been sustained, and the judgment rendered is erroneous. Chapter 128, Laws of 1881, commonly known as "the prohibitory liquor law," prohibits the sale and barter, directly or indirectly, of all kinds of intoxicating liquors, except for medical, scientific and mechanical purposes, and makes it a criminal offense for any person to sell or barter, directly or indirectly, any kind of intoxicating liquor, except for some one of such purposes. The plaintiff below claims that he bought, by a single and indivisible contract, a lot and the building thereon, with a stock of intoxicating liquors, including bar fixtures, etc., contained in the building upon the lot, of the value

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of \$1,500. Neither of the parties had any permit to engage in the sale of intoxicating liquors, nor were any of the liquors purchased for medical, scientific or mechanical purposes. The contract testified to was an entire one; it is not in its nature divisible or separable into distinct parts; therefore the whole contract is void and cannot be enforced; it cannot be used as the basis of an action. Where a part of a consideration of an entire contract is illegal, the contract is tainted and the courts will not compel its performance. "You shall not stipulate for iniquity; all writers upon our law agree in this: no polluted hand shall touch the pure fountains of justice." *Collins v. Blantern*, 2 Wils. 341. The policy of the law is to leave the parties in all such cases without remedy against each other; the courts will not lend their aid to a party who founds his cause of action upon an immoral or illegal act. If, from a plaintiff's own statement, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of the State, there the court says he has no right to be assisted. Whart. Cont., § 340; *Korman v. Henry*, 32 Kans. 49, 343.

The amendment allowed to the pleadings in no way affected the contract of the parties, or cured its illegality. The contract not being in its nature divisible or separable into distinct parts, plaintiff below had no right to ignore his purchase of the intoxicating liquors and recover the real estate. He could not thus cover up the illegality of the transaction or agreement in which he participated, nor could he in this manner have the court aid him in separating or purging the illegal from the legal consideration. A part of the consideration of the contract between the parties to the action being illegal, and there being no means of separating the legal from the illegal part of the consideration, the enforcement of the contract, or any part thereof, cannot be had in the courts. *McBratney v. Chandler*, 22 Kans. 692.

The judgment of the District Court will be reversed, and the cause remanded.

All the justices concurring.

Judgment reversed.

COHEN v. ST. LOUIS, FORT SCOTT AND WICHITA RAILROAD CO.

(24 Kans. 186.)

Railroads — condemnation — damages.

Where a railroad company has constructed and is operating its road through land of another, without having instituted condemnation proceedings or acquired title, the owner of the land may elect to sue for damages.

Where a railroad grade has been constructed and abandoned, and another company takes possession and appropriates it, the owner of the land is entitled to recover the value of the land taken, as enhanced by such grade.

Where a railroad company takes possession of land and constructs a track on it with the consent of the person in possession, under claim and color of title, and the paramount owner afterward sues for damages, the railroad company cannot be compelled to pay for improvements made by itself.

ACTION for land damages. The opinion states the case.

J. D. McCloerty, for plaintiff in error.

Blair & Perry, J. H. Sallee, and J. H. Richards, for defendant in error.

VALENTINE, J. This was an action brought by A. Cohen in the District Court of Bourbon county, on November 17, 1881, against the St. Louis, Fort Scott and Wichita Railroad Company, to recover \$28,700, with interest from October 1, 1880, as damages for the permanent taking and appropriation by the defendant, on or about October 1, 1880, of a strip of land through the plaintiff's premises for a right of way, and for railroad purposes. The case was tried before a referee. His report is dated March 28, 1884, and was filed in the District Court on May 22, 1884. The report shows that the referee found in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages as follows:

For the value of the strip of land taken by the defendant, exclusive of the old railroad grade.	\$195 00
For the value of the old railroad grade taken and appropriated by the defendant, exclusive of the land.	8,539 32
For the value of the new railroad grade constructed by the defendant itself.	2,050 98

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For the value of the hewed ties put upon the railroad bed by the defendant.....	\$1,491 10
For the value of the sawed ties furnished and used by the defendant for a similar purpose.....	132 68
For the value of the railroad track put upon these ties by the defendant.....	6,146 00
For the injury done to the land, outside of the land taken.....	2,030 00
	<hr/>
Making a total of.....	\$15,585 08
	<hr/>

The plaintiff however asked in his petition for only \$2,000, as injury to his land outside of the land taken, and therefore the referee recommended that \$30 of the above amount be deducted, and that judgment should be rendered in favor of the plaintiff and against the defendant for \$15,555,08. A motion was made by the defendant to set aside the report of the referee and for a new trial, and a motion was made by the plaintiff to confirm the report of the referee and for judgment thereon, and the motions were heard together, and the court partly overruled and partly sustained each motion, and rendered judgment in favor of the plaintiff and against the defendant for \$2,195. This judgment was intended to cover the value of the strip of land taken by the defendant and the damages to the land outside of such strip, and the court refused to render judgment for the value of the old grade, or the value of the new grade, or the value of the cross-ties or iron, or other material furnished and used by the defendant itself in constructing its railroad track. Both parties excepted to this judgment, and saved proper exceptions not only to the judgment itself, but to all the various rulings of the court below against each of them respectively. The defendant claims that this judgment furnished more than ample compensation to the plaintiff for all damages which he sustained; and the defendant refers to the fact that the entire land, six hundred acres, was sold in February, 1882, by the plaintiff to the present owner for \$6,500, the plaintiff reserving the right to recover compensation from the railroad company for all damages to the land by reason of the railroad company's appropriation of the right of way over the same; and the fact that the present owner testified on the trial that the injury to the land by reason of the construction and operation of the railroad through it was only

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about \$100. The plaintiff however is not satisfied with the judgment rendered in his favor by the court below, claiming that it is rendered for too small an amount, and he now brings the case to this court for review.

The plaintiff relies for a reversal of such judgment upon the findings of fact made by the referee, claiming that such findings authorize and require a judgment vastly greater in amount than the one rendered by the court below. He claims that the judgment should have been rendered for the full amount of the damages found by the referee, together with interest on the same from the time of the taking of the property by the railroad company, to-wit, October 1, 1880, up to the time of the finding by the referee. This would make the judgment amount to over \$19,000. The defendant however calls in question and controverts the correctness of several of the findings of the referee, claiming that they are not authorized by the evidence and should be virtually ignored. This claim of the defendant seems to be well founded as to some of the findings complained of; but as the defendant has not filed any petition in error nor cross-petition in error in this court, the question arises: To what extent can we examine the evidence to see whether the findings are warranted by the evidence or not?

It seems to be admitted by the parties that an action of this kind may be maintained; or in other words, it seems to be admitted that where a railroad company has constructed and is operating its railroad through a piece of land belonging to another, without having first obtained a right of way by any formal condemnation proceedings, and without having procured any title to the land or any easement therein, the owner of the land may waive formal condemnation proceedings, and all formal modes of transfer, and elect to regard the action of the railroad company as taking the property under the right of eminent domain, and may commence an ordinary action to recover compensation for all the damages which he has sustained by reason of the permanent taking and appropriation of the right of way by the railroad company. We think such an action may be maintained. *C. B. U. P. R. Co. v. Andrews*, 26 Kans. 703, 710 *et seq.*; *Parsons Water Co. v. Knapp*, 33 Kans. 752; *U. S. v. G. F. Man'g Co.*, 112 U. S. 645.

The plaintiff presents the following questions to this court as being involved in this case, and with regard to which he claims the court below erred: (1.) Is the owner of land through which a rail-

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road grade has been constructed and afterward abandoned, entitled to compensation for such grade from another railroad company which afterward takes possession of the grade and permanently appropriates the same to its own use? (2.) Where a railroad company has taken possession of a strip of land, and constructed a railroad track thereon, without any formal condemnation proceedings therefor, and without procuring any title thereto or easement therein from the owner of the land, is such owner, in an action brought by him against such railroad company to recover damages for the permanent taking and appropriation of such strip, entitled to recover for all the materials and work furnished by the railroad company itself, and used in the construction of its railroad track? (3.) Is a land-owner, in an action brought by himself against the railroad company to recover damages for the permanent taking and appropriation of a right of way through his land, entitled to any interest upon the amounts allowed as damages; and, if so, is he entitled to interest from the time of the taking of the right of way by the railroad company?

The first question we think must be answered substantially in the affirmative. When the old grade in the present case was constructed by the first railroad company and abandoned, such grade became the absolute property of the land-owner; and he had the right to use it for any purpose which he might choose, or to sell it for any purpose which he might choose, or for which it might or could be used; and under the laws of this State other persons or corporations as well as the defendant might have used it; for under the laws of this State there is no limit upon the building of railroads, or upon the incorporation and organization of railroad companies; and if any other person or corporation than the owner of the land had afterward entered upon the land and procured a right to such grade by virtue of condemnation proceedings, or *quasi* condemnation proceedings, as in the present case, the owner would have the right to recover from such person or corporation the full value of the land taken, including the value of the grade, for whatever purpose the land or the grade might or could be used. This proposition we think is founded in reason, and sustained by the authorities—among which are the following: *King v. M. U. R. Co.*, 32 Minn. 224; *St. L., J. & O. R. Co. v. Kirby*, 104 Ill. 345; *DeBoul v. F. & M. Ry. Co.*, 111 Ill. 499; *Goodin v. C. & W. Canal Co.*, 18 Ohio St. 169.

Of course the owner of the land has no right to recover the amount of the cost of making such a grade, or the amount which the grade actually did cost, or the benefit which the land or the grade would be to the railroad company; for such is not the proper measure of his damages. *B. R. & M. R. Co. v. Barnard*, 9 Hun, 104; *S. R. & D. R. Co. v. Keith*, 53 Ga. 178; 8 Suth. Dam. 462 *et seq.* But as before stated, he is entitled to recover the exact market value of the land upon which the grade is constructed, for whatever purpose such land might or could be used. If the grade could be used for railroad purposes, and if the land was more valuable for railroad purposes than for any other purpose, and if the grade enhanced the value of the land for railroad purposes, then the enhanced value of the land for railroad purposes should be taken into consideration.

The next question raised by the plaintiff is, whether the railroad company must be required to pay to the owner of the land the value of all the work and materials which it itself furnished in constructing its railroad track across the plaintiff's land. This work and these materials are of the value of \$9,820.76. This question we think must be answered in the negative. Of course it must be admitted that where a mere wrong-doer, a naked trespasser, enters upon the land of another, and makes improvements thereon of a permanent character, such improvements become the property of the land-owner; and this will apply to railroad companies as well as to others. If a railroad company should enter upon the land of another, without any color or claim of right or privilege, as a mere wrong-doer, a naked trespasser, and construct a railroad track on such land, such railroad track would of course become the property of the land-owner. *Graham v. C. & N. C. J. R. Co.*, 36 Ind. 463; s. c., 10 Am. Rep. 56; *Matter of L. I. R. Co.*, 6 Thomp. & Cook, 298; *Hunt v. M. P. R. Co.*, 76 Mo. 115; *Price v. W. Ferry Co.*, 31 N. J. Eq. 31; *Meriam v. Brown*, 128 Mass. 391; *U. S. v. Land in Monterey Co.*, 47 Cal. 515; *Kimball v. Adams*, 52 Wis. 554. But neither the foregoing principles nor the above authorities apply to the present case. The railroad company in the present case was not a wrong-doer nor a trespasser in any sense. It was a duly organized railroad company under the laws of Kansas, and had a right to build its railroad across the plaintiff's land, provided, of course, that it first procured the right of way from the owner of the land; and it had the right to procure such right of way by condem-

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nation proceedings, as the representative of the sovereign authority, the State of Kansas; for the operation of a railroad is everywhere considered and held to be a public purpose, and the statutes of Kansas authorize such condemnation proceedings. And the railroad company took possession of the land for its right of way and appropriated the same to its own use with the consent of the only person who had the possession of the land, and the only person who seemed at the time to be the owner thereof. This person was B. F. Files. He had the unquestioned possession of the land and claimed title thereto, and claimed the land as his own. He had tax deeds on all the land through which the defendant's railroad was constructed, and such tax deeds were duly recorded. It is true that these tax deeds were voidable for two or three reasons at the instance of the plaintiff, the original and paramount owner of the land, but they were probably only voidable. But even if void, still a person holding the possession of land under a void tax deed is not a trespasser, but may make improvements on the land, and may recover compensation from the paramount owner for such improvements under the occupying claimant law. *Stebbins v. Guthrie*, 4 Kans. 353, 366, 367; *Smith v. Smith*, 15 Kans. 290; *Milbank v. Ostertag*, 24 Kans. 462, 466. Files also owed a mortgage, past due, on one-quarter section of the land. Files was also the agent of the plaintiff for the land, authorized to take care of it, and to rent it, and to collect the rents, and to treat the land substantially as his own; and he did treat the land as his own and claimed title thereto; and the evidence shows that he entered into a duly acknowledged written contract with the railroad company for the sale and conveyance of a right of way through at least one-quarter section of the land, and the railroad company got permission of Files, either orally or in writing, to enter upon and procure the right-of-way through the other quarter section, and to construct its railroad track thereon. The findings of the referee would seem to indicate that the whole of the contract between Files and the railroad company was in parol, but the evidence shows as we have stated. Under such circumstances, the railroad company was neither a wrong-doer nor a trespasser, although it may be admitted that it did not procure any legal and indefeasible title to or easement in its right of way. Nor has the plaintiff treated the railroad company as a trespasser. He has allowed the company to retain its right of way, as a permanent easement, and simply sues it for compensation and

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damages. If the plaintiff really supposed that the railroad company was a mere naked trespasser on his land, why did he not commence an action of ejectment to oust it from his premises? He had his election. But he did not choose to treat the railroad company as a trespasser, but elected to ratify and confirm the railroad company's selection of his land for a permanent right of way, and simply brought this action to recover such compensation or damages as he would recover in an ordinary condemnation proceeding. Under such circumstances, the railroad company will not be required to pay for the improvements which it itself made upon the land, but will be required to pay only the value of the strip of land which it appropriated and the damages to the land; and this value and these damages will be computed as of the time when the railroad company first took possession of said strip and occupied the same as its right of way. This we think is founded in reason and sustained by the weight of authority. *C. B. U. P. R. Co. v. Andrews*, 26 Kans. 702, 710, 711; *Justice v. N. V. R. Co.*, 87 Penn. St. 28; *B. R. & M. R. Co. v. Barnard*, 9 Hun, 104; *C. P. R. Co. v. Armstrong*, 46 Cal. 85; *Daniels v. C. I. & N. R. Co.*, 41 Iowa, 52; *Lyon v. C. B. & M. R. Co.*, 42 Wis. 533; *Greve v. First Div. St. P. & P. R. Co.*, 26 Minn. 66; *Morgan v. C. & N. E. R. Co.*, 39 Mich. 675; *Dietrich v. Murdock*, 42 Mo. 279; *N. C. R. Co. v. Canton Co. of Baltimore*, 30 Md. 347; *Pitkin v. Springfield*, 112 Mass. 509.

It has even been held that where a railroad company enters upon land as a technical trespasser, and afterward procures the land for its right of way by condemnation proceedings; it is not compelled to pay for the improvements which it itself made upon the land while it was technically a trespasser, and before it legally procured its right of way. *Justice v. N. V. R. Co.*, 87 Penn. St. 28; *Daniels v. C. I. & N. R. Co.*, 41 Iowa, 52; *Lyon v. C. B. & M. R. Co.*, 42 Wis. 533; *Greve v. First Div. St. P. & P. R. Co.*, 26 Minn. 66.

This seems like justice; but whether it is or not, surely where a railroad company enters upon a piece of land for the purpose of constructing a railroad track, and does so under the honest belief that it has a right to do so, and expends thousands of dollars thereon under such belief, and no person objects to its occupancy, or questions its right, while it is expending its money making improvements on the land, and where the paramount owner of the land afterward treats the railroad company, not as a trespasser upon his

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land, but as a party which has in fact procured a permanent right of way over the land, and upon such theory sues the railroad company merely for the damages resulting from the permanent taking of the right of way including the value of the land taken and the permanent damages to his other property, he cannot say that the railroad company was at any time a mere trespasser; and he can recover only for the value of the land taken, and the damages to that not taken at the time when the railroad company first entered upon his land, and occupied the same for the purpose of procuring a right of way. See the authorities above cited, and especially the reasoning in the case of the *C. B. U. P. R. Co. v. Andrews*, 26 Kans. 711 *et seq.*; and also, with regard to permitting parties to make improvements without objection, see *Reisner v. Strong*, 24 Kans. 410; *Goodin v. C. & W. C. Co.*, 18 Ohio St. 169.

The judgment of the court below will be modified by adding to it the value of the old grade as found by the referee, and interest on all the sums allowed by the District Court and this court at the rate of seven per cent per annum from October 1, 1880, the time when the defendant first took possession of the plaintiff's land as a right of way.

Judgment modified.

All the justices concurring.

LARSON V. BERQUIST.

(24 Kans. 224.)

Master and servant — duty to young female servant.

Where an inexperienced girl of tender years was employed by the defendant as a house servant, and during her employment her menses began, the defendant advised her that menstruation was a dangerous disease, likely to cause insanity and death, and that the best and only known remedy was hard and unrelenting labor; and by reason of this advice she was induced to do work far beyond her strength, by reason of which she became sick and was permanently crippled and disabled. *Held*, that her father might recover damages.

ACTION of damages. The opinion states the case. The defendant had judgment below.

A. D. Wilson and Sturges & Kennett, for plaintiff in error.

J. W. Sheafer, for defendants in error.

JOHNSTON, J. This action was brought to recover damages for the alleged willful negligence and misconduct of the defendant toward the plaintiff's minor child while she was in the service of the defendant. The question raised by the defendant's demurrer, and the only one presented for our determination, is, whether the plaintiff in his petition states a cause of action against the defendants. It is conceded that the parent is entitled to indemnity for wrongful injury to his minor child where a loss of service results from such injury. In such a case the loss of service is the gist of the action, and where there is no injury in that respect, no recovery can be had. It is alleged that the plaintiff's daughter was a minor child of tender years, and was employed for a period of two years as a house servant to perform such service as was suitable for a person of her years and strength. As compensation she was to receive board and clothing for the first eighteen months of the term of service, and during the last six months of the term she was to be paid, in lieu of clothing, \$1.25 per week. In such a case it was the duty, and there was an obligation upon the defendants, implied by the law as an incident to the contract, to treat the plaintiff's daughter humanely and reasonably. They were bound to exercise ordinary care and diligence to protect her from injury in the course of the employment, and their failure in that respect will make them responsible in damages. A higher degree of care and a greater precaution is required of the master where the servant is an infant, and has not yet reached the years of judgment and discretion, than in a case where the servant is an adult person of ordinary intelligence and judgment. *Robinson v. Cone*, 22 Vt. 213; *Rauch v. Lloyd*, 31 Penn. St. 358; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; s. c., 3 Am. Rep. 506; *O'Connor v. Adams*, 120 Mass. 427; *Smith v. O'Connor*, 48 Penn. St. 218; *Hill v. Gust*, 55 Ind. 45; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503; *Cooley Torts*, 553, and cited cases.

It is stated in the petition that the plaintiff's daughter was an inexperienced girl of tender years, and that during the employment her menses began, causing her great pain and sickness; that after gaining her confidence the defendants took advantage of her weak-

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ness, youth and inexperience, and in order that she might continue in their service and perform a great and unusual amount of labor for them, they negligently, willfully and wickedly advised her that menstruation was a dangerous disease, likely to cause insanity and death, and that the best and only known remedy therefor was hard and unremitting labor. It is alleged further, that by reason of these representations and the influence wrongfully exerted upon her by the defendants, she was exposed to danger and hardship, made to do work for them far beyond her strength, and that they compelled her to perform the labor of two persons, by reason of which she became very sick, was permanently crippled and disabled, and ever since that time her father has been not only deprived of her assistance and service, but has been required to expend for necessary care, nursing and medical attendance, the sum of \$500.

If the facts are as recited in the petition, they show that the defendants not only failed in their duty, but were grossly negligent of the plaintiff's daughter. Their conduct toward her was wanton and cruel in the extreme, for the consequence of which, if there is no concurrent negligence of the plaintiff, the defendants are answerable. By the strongest principles of morality and good faith, they should have given her reasonable care and honest counsel. At no period of her life was such care more important or necessary. She was a motherless girl of tender years, who relied, as the defendants knew, upon their advice. For the purposes of gain they misused her confidence, took advantage of her immaturity and her lack of discretion and judgment, and directly caused and compelled her to do that which resulted in great and permanent injury to herself, and a consequent loss to her father. It is said by the defendants that she was under no obligation to perform labor beyond her strength, and might have declined the service exacted, under the requirements of the contract; and also that she had no right to rely upon misrepresentations of the defendants, as she had equal means of information with them. This would be true if the person injured had been an adult of ordinary prudence and discretion; but as we have seen, a different rule applies in the case of a child of tender years, who is unable to appreciate the dangers to which she would be subjected in performing the service required of her. It is said that the petition does not state the age of the plaintiff's minor child, and that there is nothing to show that she had not the intelligence and judgment of an adult. In this respect the

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petition is somewhat faulty; but if they desire to assail the petition upon the ground of indefiniteness and uncertainty, it should be done by a motion instead of a demurrer. While the exact age of the plaintiff's daughter is not stated, enough is alleged to make it appear that she was immature and did not have the capacity and discretion to understand her condition and the dangers of the extraordinary service which the defendants wrongfully induced her to perform. Besides, it is averred in express terms that she was a delicate, inexperienced girl of tender years. She was therefore not bound to the same rule of care and diligence in avoiding the consequence of the defendants' neglect that would be required of adult persons of ordinary intelligence and discretion. If it should appear upon the trial, as is now claimed by counsel for defendants, that no willful wrong was done by defendants, and that the girl was of sufficient age and capacity to understand the dangers incurred by her in doing the work directed to be done, no recovery could be had by the plaintiff, as the negligence of the girl would be imputed to the father; and if the father consented to the wrongful action of the defendants, or in any way co-operated in producing the injury, it would defeat a recovery in his favor. However, these are matters of defense which do not appear upon the face of the petition, and therefore need no consideration now.

We are of opinion that the court erred in sustaining the demurrer. Its judgment will be reversed, and the cause remanded for further proceedings.

All the justices concurring.

Judgment reversed.

KANSAS CITY, FORT SCOTT & GULF RAILROAD COMPANY v.
MORRISON.

(34 Kans. 503.)

Carrier — baggage — working tools.

A reasonable quantity of his tools is proper baggage for a mechanic working as a watchmaker and jeweller.

ACTION for value of lost baggage. The opinion states the point. The plaintiff had judgment below.

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Wallace Pratt, and Blair & Perry, for plaintiff in error.

Kimball & Osgood, for defendant in error.

HOKTON, C. J. The evidence introduced upon the trial on the part of plaintiff below shows he purchased a ticket at Fort Scott for Parsons, on February, 8, 1884, of the agent of the Kansas City, Fort Scott & Gulf Railroad Company; that he checked his trunk for Parsons a half-hour before the train started; that he arrived at Parsons at 7 o'clock of that day, and on his arrival asked the baggageman at the railroad depot if his baggage had come, and was informed it had not; that on the next day he again inquired of the depot agent about his baggage, and was again told it had not arrived; that on the morning of the 10th he went to the depot, but found no one there; that he then gave his baggage check to the proprietor of the Belmont Hotel, at Parsons, with instructions to have his trunk brought from the depot; that the porter at the Belmont Hotel went to the depot after the trunk in the afternoon of February 11th, and presented to the baggageman the check for the trunk, and asked for it, but was told by him it was not there; that a servant of the Belmont went to the depot on February 12th about 6:25 P. M., for the trunk, but found no one there.

The evidence on the part of the railroad company established that the trunk reached Parsons on February 9, 1884; that it was apparently in good order when it arrived; that on February 15 the depot was burglarized, and the trunk broken open and robbed.

The jury found that the plaintiff demanded his trunk on February 9, 1884, and again demanded it on February 11; and these findings are supported by the evidence, because the demand made by the porter of the Belmont on the 11th was the same as if plaintiff had made the demand, as the porter was acting for him and in his interest. Therefore we may omit from this case all discussion of the liability of the defendant below as warehouseman or bailee for hire. If plaintiff demanded his baggage, as testified to, and the company, having the trunk at its depot at Parsons, refused to deliver it, the company is responsible to the owner for its contents, although the trunk was subsequently broken open and robbed without its fault. The liability of the railroad company was co-extensive with its custody of the trunk, and continued until it was

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safely delivered into the hands of its owner, if the owner called for and demanded the trunk within a reasonable time after it reached Parsons. All of this was done by the owner. *A. T. & S. F. R. Co. v. Brewer*, 20 Kans. 669; *C., R. I. & Pac. R. Co. v. Conklin*, 32 Kans. 55; *Thomp. Carr.* 530-532.

We think therefore that there is only one principal question presented by the record for our determination: That is, whether the tools of plaintiff below are proper baggage for a watchmaker and jeweller. The general rule is that the implied obligation of a common carrier to carry the baggage of a passenger does not extend beyond ordinary baggage; and it may be said generally that by baggage we are to understand such articles of personal convenience or necessity as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the trunks of passengers, which are not however designed for any such use, but for other purposes, such as a sale and the like. *Story Bailm.* 499; *Hutch. Carr.*, § 679. The decisions on the subject of passengers' baggage turn upon the question: What articles may baggage consist of? This is a mixed question of law and fact, to be determined by the jury under proper instructions from the court. In *Macrow v. Railway Co.*, L. R., 6 Q. B. 612, the question coming before the court as to what was properly included by the term baggage, the true rule was said by COCKBURN, C. J., to be: "That whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, must be considered as personal luggage. This would include not only all articles of apparel, whether for use or ornament, but also the gun case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his journeying * * * But merchandise, or furniture, or household goods would not come within the description of ordinary luggage, unless accepted as such by the carrier."

It is also held by the authorities that a reasonable quantity of his tools is proper baggage for a mechanic. *Davis v. R. Co.*, 10 How. Pr. 330; *Porter v. Hildebrand*, 14 Penn. St. 129. The cases of *Davis v. R. Co.*, *supra*, and *Porter v. Hildebrand*, *supra*, are

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cited by Thompson in his work on Carriers, and also by Hutchinson in his work on the same subject; and are also referred to in other text-books without criticism or other unfavorable comment. Thomp. Carr. 513; Hutch. Carr., § 683.

These cases are quite similar to the one at bar, excepting that the tools in controversy are more valuable. In *Davis v. R. Co.*, the contents of the trunk consisted of ordinary wearing apparel, a gun and a set of harness-maker's tools worth \$10. The plaintiff was a harness-maker by trade, and it was proved that it is usual for those of that trade, in going from place to place, to take their tools with them in their trunks. In *Porter v. Hildebrand*, the plaintiff was a carpenter, and his trunk contained \$45 of clothing and \$55 of carpenters' tools. He was moving from Pennsylvania to the State of Ohio, and he delivered his trunk to the owners of a stage to carry it from Pittsburgh to Wooster, Ohio. In that case, the court speaking through BELL, J., said: "Another question disclosed by the record is whether a recovery can be had for the value of the carpenters' tools, which the jury have found were a reasonable part of the plaintiff's baggage. * * * The right to carry tools as baggage is unquestionably open to abuse; but in the language of the court in *McGill v. Rowand*, 3 Penn. St. 451, the correction is to be found in the intelligence and integrity of the jury called to determine under the circumstances of each case. It is, it is said, a common thing for journeymen mechanics to carry in their trunks with clothing, a small and select portion of their tools. To this practice I see no such objection as ought to put this kind of property out of the protection afforded to the necessities a traveller is compelled by legitimate considerations to transport with his person. Upon this score, the judgment rendered below is, I think, unobjectionable."

The evidence shows that plaintiff below was a watchmaker and jeweller; that he went to Parsons to work at watchmaking; that the tools in his trunk were intended for repairing watches and were necessary for his work; and that they were the tools usually carried by a person of his trade or occupation. The plaintiff is therefore, strictly speaking a mechanic, and a reasonable quantity of his tools is proper baggage. The term "baggage" was fairly defined to the jury in the instructions of the court, and we do not think any of the instructions were misleading or prejudicial, although as a whole they were unnecessarily prolix. What was a reasonable

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quantity of tools for plaintiff below to carry, was a question for the jury.

The judgment of the District Court must be affirmed.

Judgment affirmed.

All the justices concurring.

GREEN V. GREEN.

(24 Kans. 746.)

Marriage — oral settlement by wife — fraud.

A widow owning one hundred and sixty acres of land in this State, which was all of her property and her sole means of support, induced G., a cripple, possessed of only a few hundred dollars to marry her, on her oral promise that the proceeds of the land should go to their support after they were married so long as they lived. G. married her reluctantly, and in reliance upon that promise. After the marriage he furnished rooms, food and clothing for the family, and also for the children of his wife by her former marriage, and permitted her to use \$100 of his money to pay a mortgage upon the land. The wife, about eighteen months after the marriage, delivered to her daughters by her former marriage deeds of the land, for the consideration of love and affection only, which she had executed without the knowledge or consent of G., just on the eve of her marriage. *Held*, that G. might maintain an action during the life of his wife to set the deeds aside.

ACTION to set aside deeds. The opinion states the case. The defendant had judgment below.

Welch, Lawrence & Welch, for plaintiff in error.

Stumbaugh, Arnold & Hilton, for defendant in error Easterday.

HORTON, C. J. Harriet F. Wilcox, being the owner of certain real estate, and about to be married to Oliver Green, signed and executed deeds of all her real estate to her children the day before her marriage. The deeds were made without the knowledge or consent of her intended husband, and for no other consideration than love and affection. The grantees of Harriet F. Wilcox, now Harriet F. Green, executed deeds of the property to James H. Easterday, who at the time had knowledge of all the circumstances

attending the execution of the deeds to them. Oliver Green, the husband, attempts to set aside these deeds, alleging that the same are fraudulent as to him. The defendant, James H. Easterday, demurred to the petition of plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer being sustained by the court, the plaintiff now brings the case here for review.

On the part of the defendants it is claimed that the sole question for our consideration is, whether a voluntary conveyance of all her real estate executed by a woman on the eve of marriage, without the knowledge or consent of her intended husband, is fraudulent as to his marital rights. If this were the only question in the case we might, perhaps repeat what is said in *Butler v. Butler*, 21 Kans. 525; s. c., 30 Am. Rep. 441, that "it may be doubted whether it is the law in Kansas to-day that such a conveyance is fraudulent." Under the allegations of the petition, however, a very different question is presented. The petition, among other things, alleges that in August, 1882, Oliver Green and Harriet F. Wilcox were engaged to be married; that at the time of the engagement, Harriet F. was the owner of a farm of 160 acres, in Shawnee county, in this State; that the farm was all the property belonging to her; that Oliver Green was possessed of only a few hundred dollars in cash; that Harriet F. Wilcox induced Oliver Green to make the matrimonial engagement with her and to marry her, representing to him at the time of the engagement that the farm belonged to her, and that its proceeds should go to their support after they were married so long as they lived, and then to her children; that the proceeds of the farm were ample to keep both parties; that Green was loth to make any marriage engagement or to marry Harriet F. without some assurance of support, as he was a cripple, having lost his right forearm; that on account of these promises and other similar representations of Harriet F., and relying thereon, Green married her August 31, 1882; that the parties then proceeded to live together as husband and wife in the city of Topeka; that plaintiff furnished rooms and bought food and clothing for his family, also for a single daughter of his wife, and for her widowed daughter and two little children; that the plaintiff received none of the proceeds of the farm although his wife controlled and rented the same in her own name; that at the time of the marriage there was a mortgage of \$100 upon the farm, and with money belonging to the plaintiff his

wife paid off the mortgage, February 14, 1883; that subsequently, without any reason or provocation, she deserted her home and husband; that on August 30, 1882, on the eve of her marriage, Harriet F. Wilcox, without the knowledge or consent of plaintiff, signed and executed deeds purporting to convey her farm—being all of her own means of support—to her daughters by a former marriage, without other consideration than love and affection; that these deeds were not delivered until March 5, 1884—long after the marriage. They were then recorded in the office of the register of deeds of Shawnee county.

For the purposes of this case, all the allegations of the petition must be taken as true. Therefore we must assume there was a verbal ante-nuptial contract existing between Oliver Green and Harriet F. Wilcox, at the time of their marriage; that the marriage was consummated by Green on account of his reliance upon the ante-nuptial contract; and that Harriet F. Wilcox, now Green, has been guilty of misrepresentation, deception and actual fraud toward Oliver Green before and after her marriage. The question is, whether, under all these circumstances, the deeds delivered subsequent to the marriage can be set aside as fraudulent to the husband. We decided in *Hafer v. Hafer*, 33 Kans. 440, that: "The statutes of this State recognize the right of parties contemplating marriage to make settlements and contracts relating to and based upon the consideration of marriage, and that an ante-nuptial contract providing a different rule than the one prescribed by law for settling their property rights, entered into by persons competent to contract, and which, considering the circumstances of the parties at the time of making the same, is reasonable and just in its provisions, should be upheld and enforced."

And we further decided that "Marriage is a good and sufficient consideration to sustain an ante-nuptial contract." Section 6 of chapter 43, Comp. Laws of 1879, of the statute for the prevention of frauds and perjuries, provides: "No action shall be brought * * * to charge any person upon any agreement made upon consideration of marriage, * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

But for this statute, we suppose it would be conceded that the

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ante-nuptial contract might be enforced, or at least that the deeds of Harriet F. Green, late Wilcox, attempting to convey, without consideration, all her real estate, so as to deprive herself of the power of carrying out her promises and contract, would be invalid as a fraud upon her husband.

"It is generally true that representations on which a marriage is had are upheld in equity on the ground of fraud; and where there is no fraud, the rule does not apply. * * * Actual fraud will in equity break through any law that is not penal or political in character, through any law written or unwritten which goes only to the rights of the parties, and has no public object to serve apart from doing justice between man and man." 1 Reed Stat. Frauds, § 175. See also *Jenkins v. Eldredge*, 3 Story, 181; *Durham v. Taylor*, 29 Ga. 166."

In *Glass v. Hulbert*, 102 Mass. 24; s. c., 3 Am. Rep. 418, it was said: "The marriage, although not regarded as a part performance of the agreement for marriage settlements, is such an irretrievable change of situation that if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be executed, the other parties are held to make good the agreement and not permitted to defeat it by pleading the statute."

In *Petty v. Petty*, 4 B. Monr. 215; s. c., 39 Am. Dec. 501, the wife, in her petition, charged that her husband, being much the elder and in good circumstances, as an inducement to the contract of marriage and as a means of providing for her support in the event of his death, before the marriage promised her that if she would marry him he would immediately after the marriage make a deed of settlement, etc. A few days after the marriage, her husband disclosed to her for the first time that he had been induced by certain persons to make over his property before he married. The court said, in passing upon the case, that "the wife has been fraudulently deprived of the right of dower by the deeds in question; to that extent at least of this interest, if no further, their execution was a fraud upon her and ought not to stand."

In *Sutherland v. Adm'r*, 5 Bush, 591, it is held that "As between parties, an oral ante-nuptial contract that neither party should claim or interfere with the property of the other any more than if they had not married, is unquestionable, and also as to all claiming as volunteers under them." In this case, in addition to the oral nuptial contract between the parties, the deed, although

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executed just upon the eve of marriage, was not delivered until long after; and as a deed takes effect only from the time of its delivery, therefore it had no force until after the marriage. *Rail-road Co. v. Owen*, 8 Kans. 410, 419; *Babbitt v. Johnson*, 15 Kans. 252; *Mitchell v. Skinner*, 17 Kans. 565; *Harrison v. Andrews*, 18 Kans. 535.

In *Busenbark v. Busenbark*, 33 Kans. 572, we held that "While the wife's right and interest in the real estate of her husband not occupied by the family as a homestead is inchoate and uncertain, yet it possesses the element of property to such a degree that she may maintain an action during the life of her husband to prevent its wrongful alienation or disposition under fraudulent judgments procured and consented to by the husband with the object and for the purpose of defeating the wife's right."

Upon the well-established doctrine that fraud takes any case out of the statute of frauds, and the principle declared in *Busenbark v. Busenbark*, we conclude that the deeds in controversy are in fraud of the rights of plaintiff, and that he is entitled to have them set aside. See also *Youngs v. Carter*, 10 Hun, 194; *Petty v. Petty*, *supra*; *Kelly v. McGrath*, 70 Ala. 75; *Freeman v. Hartman*, 45 Ill. 57.

The defendant, James H. Easterday, having purchased his title with full knowledge of plaintiff's rights, can have no better title than his grantors.

The judgment of the District Court will be reversed, and the cause remanded with directions to overrule the demurrer.

Judgment reversed and cause remanded.

All the justices concurring.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MEICKLEY v. PARSONS.

(88 Iowa, 68.)

Sale — warranty — patent defects.

It is no defense against a warranty of a kiln of brick, that the defect might have been discovered if the buyer had gone on top of the kiln.

ACTION on a promissory note given for brick. The head-note shows the point. The plaintiff had judgment below.

John Breen and R. M. Wright, for appellants.

A. A. Botsford, for appellee.

ADAMS, J. There was evidence tending to show that the plaintiff expressly warranted the brick "to be good brick and all right;" that they in fact were not all good; that there were in the kiln between 45,000 and 50,000 brick, and that about 10,000 were worthless; that the purchaser saw the exterior of the kiln, and that the brick upon the outside appeared to be good, but upon the removal of a portion of them there was revealed what the witnesses call a "cold spot," where the brick had been imperfectly burned; that the "cold spot," or defective part of the kiln, could have been

discovered by the purchaser, but not without going upon the top of the kiln, and the kiln was covered with three thicknesses of boards, and some brick and other things, and the purchaser did not go upon the top of the kiln. The court instructed the jury that "if, by the exercise of ordinary care at the time of the purchase, he (the purchaser) might have discovered and known the character, quality and number of brick in the kiln, and failed to do so, he cannot recover because of a breach of warranty." The giving of this instruction is assigned as error. In our opinion the instruction cannot be sustained.

In *Benj. Sales*, § 616, the author says: "A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer." Some of the authorities speak of the defects which are not covered by a warranty as those which are patent or obvious. The doctrine seems to be that the warranty as to such defects is waived. The court may presume, ordinarily, that that was the understanding. But we cannot think that the purchaser who has bought with a warranty is to be careful, in order to avoid a waiver of it. The purpose of exacting a warranty may be to exempt the purchaser from the necessity of diligence. The court below was perhaps misled by a rule which applies in a different kind of a case. Where the question is as to whether a representation was understood to be a warranty or a mere expression of opinion, it may be important to inquire whether the purchaser could, in the exercise of ordinary diligence, have formed his own opinion. Where a purchaser forms his own opinion, or might be expected to do so, it is the right of the seller to insist that his representation was a mere expression of opinion. But the case before us is not one of representation, where the words used might or might not be a warranty, according to circumstances. The instruction concedes the fact of warranty. Now the brick being warranted, the purchaser, we think, might feel excused from exercising the care to discover the defect in the kiln which he, or a prudent purchaser, would probably have exercised if buying without a warranty. What precisely the court meant by ordinary care we do not know, but we suppose that it must be that above described.

Judgment reversed.

GILBERT V. HOFFMAN.

(33 Iowa, 205.)

Innkeeper — negligence — exposing guests to infection.

An innkeeper, knowing that there was small-pox in his inn, kept it open for business, and received the plaintiff as a guest. The plaintiff did not know that there was small-pox in the inn, but had heard rumors to that effect. The plaintiff contracted the disease while there. *Held*, that the defendant was liable. (*See note, p. 265.*)

ACTION of damages. The opinion states the facts. The plaintiff had judgment below.

Argo, Kelly & Augir, for appellants.

Kelly & Zink, for appellee.

REED, J. The petition alleges that plaintiff contracted the small-pox in defendants' hotel, and became sick, and by reason thereof she was removed to a pest-house, where she suffered great bodily pain and mental anguish, and was permanently disfigured in person.

[Omitting minor points.]

The evidence given on the trial shows that plaintiff arrived by train at the town in which the defendants' hotel was situated, at about three o'clock in the morning. She was met at the depot by her husband, who had been stopping for a number of days at the hotel, and she accompanied him to the house, and remained there as a guest until the evening of the next day, when the hotel was closed and "quarantined" by the authorities of the town; that is, the inmates of the house were not permitted to depart from it, except as they were removed to the pest-house when they were taken with the disease; and the public was excluded from it. When she went to the house, one of the guests was lying sick in a room in the house, and his disease proved to be the small-pox. He was examined by the physician the day before plaintiff arrived at the hotel, and there was evidence tending to prove that the physician then pronounced the disease small-pox, and informed defendants that that was its character. There is a conflict in the evidence, it is true, as to the time when defendants were informed as to the

character of the disease with which this person was afflicted, but the jury were warranted in finding that the information was communicated to them on the day before plaintiff's arrival at the hotel. There was also evidence tending to prove that in a conversation a few hours after her arrival, one of the defendants assured her husband in her presence that the disease was not in the house, and that the rumors that the person who was sick in the house had small-pox were circulated for the purpose of injuring the business of the hotel. While plaintiff's husband was at the depot awaiting her arrival, he was informed that a rumor was current that the disease was in the house, and he informed her of this before she went there.

Counsel for appellants contend that this evidence did not warrant the jury in finding for the plaintiff, because (1) it does not show that defendants were guilty of such negligence as renders them liable; and (2) that plaintiff, by going to the house after she was informed of the rumor which was current as to the presence of the disease, and without instituting an inquiry as to its truth, was guilty of such contributory negligence as precludes a recovery. But this position cannot be maintained. The jury, as we have seen, were warranted by the evidence in finding that defendants, with knowledge of the prevalence of the disease in the hotel, kept it open for business, and permitted plaintiff to become a guest, without informing her of the presence of the disease. That they would be liable to one who became their guest under these circumstances, and contracted the disease while in their house, and who was himself guilty of no negligence contributing to the injury, there can be no doubt.

The District Court properly left it to the jury to determine whether plaintiff was guilty of imprudence or negligence in going to the hotel after she heard the rumor that the disease was in the house, without inquiring further as to its truth; and they were told that if the circumstances were such as that ordinary prudence and care demanded that she should, before going to the hotel, make further inquiry as to the truth of the rumor, and she neglected to do this, and this neglect contributed to the injury, she could not recover. The instruction states the rule on the subject quite as favorably to the defendants as they had the right to demand. By keeping their hotel open for business, they in effect represented to all travellers that it was a reasonably safe place at which to stop;

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and they are hardly in a position now to insist that one who accepted and acted on this representation, and was injured because of its untruth, shall be precluded from recovering against them for the injury, on the ground that she might by further inquiry have learned of its falsity. But the jury were warranted by the evidence in finding that she was not guilty of negligence in not inquiring further as to the truth of the rumor before going to the hotel. Her husband, who informed her of the rumor, had been stopping at the hotel for two or three days, and had heard nothing while about the house of the prevalence of the disease. The information as to the currency of the rumor was communicated to him at the depot while he was awaiting the arrival of the train. The jury might well have concluded that under the circumstances she was justified in assuming that the rumor was not of such importance as to demand further investigation.

Judgment affirmed.

NOTE BY THE REPORTER.—The question of unhealthy premises has frequently arisen between landlord and tenant; some cases hold that the unhealthy condition of the premises at the time of renting, or arising during occupancy, is a constructive eviction and is ground to be released from the payment of rent, and that the landlord must keep the premises in a healthy condition. *Smith v. Marrable*, 11 M. & W. 5; *Collins v. Barrow*, 1 Moo. & R. 112; *Salisbury v. Marshall*, 4 C. & P. 65; *Cowle v. Goodwin*, 9 C. & P. 878. On the other hand other cases assert the contrary. *Sutton v. Temple*, 12 M. & W. 52; *Hart v. Windsor*, 12 M. & W. 68; *Carstairs v. Taylor*, L. R., 6 Exch. 217; *Cleves v. Willoughby*, 7 Hill, 88; *Royce v. Guggenheim*, 106 Mass. 202; s. c., 8 Am. Rep. 322; *Alston v. Grant*, 8 El. & Bl. 128. *Doupe v. Genin*, 45 N. Y. 119; s. c., 6 Am. Rep. 47, instances an incidental limitation.

Wood Land. and Ten. 624, says: "Where certain defects exist that are likely to injuriously affect the health of the tenant or his family, it is the landlord's duty to disclose the facts, and failing to do so he is liable to the tenant for all the damages resulting to the tenant, which are the immediate and proximate result of such failure. There is a strong tendency to hold that the tenant is absolved from the lease (or rent) if there are latent defects in the premises or causes not readily discoverable on examination, which render the premises unfit for occupancy, of which the landlord knew and did not inform the tenant; but this is not well established, and is contrary to the weight of authority."

Parsons, in his work on Contracts, vol. 8, p. 501, says that a landlord is under no implied obligation to repair, and that the uninhabitableness of a house is not a defense to an action for rent. But if the landlord does a positive wrong, such as an erroneous or fraudulent misdescription of the premises, or if it is made uninhabitable by the landlord's own acts, the tenant can leave the premises.

It is stated by 2 Story Cont. 422, that the landlord impliedly covenants that the premises are fit for beneficial occupation, as where the wall of a privy gave way and overflowed the kitchen with filth, and impregnated the water in the pump, and the landlord did not remove or repair it after notice, he cannot recover rent, or where a furnished house was let and the beds were infested with bugs to such an extent as to render them unfit for occupation, the landlord cannot recover rent. But this doctrine has been overruled in England and denied in America, and the rule laid down that the fact that the premises are unwholesome will not entitle the tenant to quit them (1) where he knew or could have known the fact; and (2) where the landlord has not been guilty of fraud or misrepresentation, and is in no default. Citing *Westlake v. De Grau*, 25 Wend. 669; *Foster v. Poyser*, 9 Cush. 242; s. c., 57 Am. Dec. 48; *Dutton v. Gorriah*, 9 Cush. 89.

In substance these authors hold that a landlord is not obliged to repair unhealthy premises made so by want of repairs, and is not obliged to disclose the fact that the premises are unhealthy if the tenant knew or could have known it.

In *O'Brien v. Capwell*, 59 Barb. 497, an action for injury by the breaking down of a piazza, the court said that the "law is well settled that where there is no fraud or false representation or deceit, and no express warranty or covenant to repair, there is no implied obligation or covenant that the premises are suitable or fit for occupation or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use, or that they will continue so."

In *Robbins v. Mount*, 4 Robt. 538, a case of injury by water, the court said if there is no express agreement, there is no obligation on the part of the landlord that the premises shall continue fit for the purposes for which they were demised, or that they are in a tenantable condition, or that they will continue so.

Scott v. Simmons, 54 N. H. 426, was an action for damages for injuries caused by the negligence of the landlord improperly constructing a drain and suffering it to remain defective, whereby the tenant's goods were damaged by overflow of water for which cause the tenant left the premises. The court held that the landlord was not liable, because he was only liable to repair the drain under an express covenant, the obligation to repair not being implied.

In *Westlake v. DeGrau*, 25 Wend. 669, the premises were infected with sickening and noxious smells arising from dead rats. The landlord knew of the smells but did not disclose it to the tenant. The smells produced sickness. The landlord was informed and sent a carpenter to remove the cause, but the tenant abandoned the house before the carpenter got to work. The court held the tenant liable for the rent.

The court in *Wallace v. Lent*, 1 Daly, 482, held that it was a general defense to an action for rent that the landlord did not tell the tenant of a stench in the house which he knew existed, and which subsequently caused the tenant's sickness; stating that "if the landlord knew of any cause which renders the house unhealthy he must disclose it. If he does not it is procuring an innocent person to rent a house which he knows is unfit."

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In *Weeks v. Baucerman*, 1 Daly, 100, the defense to the suit for rent was that the premises had been occupied as a brothel, which fact the landlord did not disclose to the tenant, and in consequence the tenant was insulted and annoyed by lewd persons calling at all hours of the night to such an extent that he had to leave and could not quietly and peaceably occupy the premises; the court held that this was no defense; that the landlord was not bound to disclose the uses to which the premises had been previously put, and that there was no implied warranty that the premises were suitable for the purposes rented. *Caveat emptor* applies to this case, and to all transfers of property, and purchasers take the risk of its quality and condition unless protected by an express agreement; the only exceptions being sales of provisions for domestic use, as in *Van Bracklin v. Fonda*, 12 Johns. 468, and a demise of ready furnished lodgings, as in *Smith v. Marrable*, 1 Carr. & M. 479.

In *Staples v. Anderson*, 8 Robt. 827, and *Cornfoot v. Fwuke*, 6 Mees. & W. 359, it was held a good defense to an action for rent that the landlord knew that the house had formerly been occupied as a brothel and concealed that fact from the tenant, who was compelled to remove in consequence of the annoyance. The court held this to be a fraudulent concealment.

Minor v. Sharon, 119 Mass. 477; s. c., 17 Am. Rep. 122, the landlord knew that the house was infected with the small-pox so as to be unfit for occupation, and to such an extent as to endanger health, and concealed this fact from the tenant. The tenant engaged the house and occupied it. He and his family became sick by reason of the infection. He was ignorant of the dangerous condition of the house, and no act on his part contributed to the sickness. The court held the landlord guilty of actionable negligence and liable for all the injury the tenant sustained; stating that as the landlord knew the house was infected, it was his duty to inform the tenant to refrain from renting it until it was properly disinfected, and as he did not do this, he was guilty of negligence.

So in a late unreported case in New York, the tenant moved out of a house which had been declared by the board of health to be unhealthy on account of the bad condition of the plumbing, notice to that effect having been given to the landlord. The landlord brought suit for his rent, and the defense claimed that there had been a constructive eviction by reason of the unhealthy condition of the premises. The court held that if the health of the tenant or his family is imperilled by the neglect of the landlord to make necessary repairs in the plumbing of the house the tenant is in effect deprived of the beneficial enjoyment of the premises, and may therefore move out without paying rent.

In *Smith v. Baker*, 20 Fed. Rep. 709, the defendant took his children when they had whooping cough to the plaintiff's boarding-house. Plaintiff's child took the disease, and boarders were kept away from plaintiff's house by the presence of the disease. Held, that defendant was liable to plaintiff for the damages caused. The court, WHEELER, J., said: "The defendant took his children when they had whooping-cough, a contagious disease, to the boarding house of the plaintiff to board, and exposed her child and children of other boarders to it, who took it. The jury have found that this was done without exercising due care to prevent taking the disease into the boarding-house."

She was put to expense, care and labor in consequence of her child having it, and boarders were kept away by the presence of it, whereby she lost profits. Words which import the charge of having a contagious distemper are, in themselves, actionable, because prudent people will avoid the company of persons having such distemper. *Bac. Abr., Slander, B. 2.* The carrying of persons infected with contagious disease along public thoroughfares so as to endanger the health of other travellers is indictable as a nuisance. *Add. Torts, § 297; Res v. Vantandillo, 4 M. & S. 73.* Spreading contagious diseases among animals by negligently disposing of, or allowing to escape animals infected is actionable. *Add. Torts (Wood's ed.), 10, note; Anderson v. Buckton, 1 Stra. 193.* A person sustaining an injury not common to others by a nuisance is entitled to an action. *Co. Litt. 56a.* Negligently imparting such a disease to a person is clearly as great an injury as to impute the having it, and negligently affecting the health of persons injuriously as great a wrong as so affecting that of animals."

See as to upper and lower tenements. *Doupe v. Genin, 45 N. Y. 119; a. c., 6 Am. Rep. 47; Marshall v. Cohen, 44 Ga. 489; a. c., 9 Am. Rep. 170; Gluckhauf v. Maurer, 75 Ill. 289; a. c., 20 Am. Rep. 288; Tools v. Becket, 67 Me. 254; a. c., 24 Am. Rep. 54; Woods v. Naumkeag Steam Cotton Co., 184 Mass. 357; a. c., 45 Am. Rep. 344; Purcell v. English, 86 Ind. 34; a. c., 44 Am. Rep. 255; Looney v. McLean, 129 Mass. 33; a. c., 38 Am. Rep. 295; Watkins v. Goodall, 188 Mass. 533.*

In *Smith v. Marrable, 11 M. & W. 5*, the house, let furnished, was overrun with bugs, and the tenant was released. This was put on the ground that the furniture was included in the letting, and was distinguished on that ground in *Sutton v. Temple, 12 M. & W. 52.* See *contra, Fisher v. Lighthall, 4 Mackey, 32; s. c., 54 Am. Rep. 253.* In a very recent English case, a deduction of rent of a furnished house was allowed on account of bugs. *84 Alb. L. J. 81.*

In *Collins v. Barrow, 1 M. & R. 112*, it was held that the tenants might quit if the premises became unwholesome for want of drainage.

In *Salisbury v. Marshall, 4 C. & P. 75*, the roof leaked and the water-closet and cistern were foul.

In *Cowie v. Goodwin, 9 C. & P. 378*, the privy walls gave way and the kitchen was overflowed with filth.

In *Royce v. Guggenheim, 106 Mass. 201; a. c., 8 Am. Rep. 322*, the landlord had rendered the premises unfit for habitation by the erection of a new building, and this was held an eviction.

In *Alger v. Kennedy, 49 Vt. 109; s. c., 24 Am. Rep. 117*, the same was held where the landlord, leasing upper rooms, neglected to repair a drain in the cellar, whereby the whole building was rendered unhealthy.

In *Alston v. Grant, 3 El. & Bl. 128*, a sewer was badly constructed, and the landlord was held liable for injury to goods by overflow.

In *Cesar v. Karutz, 60 N. Y. 229; s. c., 19 Am. Rep. 164*, a landlord letting premises, knowing them to be infected by a contagious disease, and not notifying the lessee, was held liable in damages for the communication of the disease.

In *Coke v. Gutkese, 80 Ky. 598; s. c., 44 Am. Rep. 499*, the landlord was held liable, where he let a house knowing that the privy timbers were rotten, and concealed the fact, and the tenant was injured.

In *Crump v. Morrell, 12 Phila. 249*, the tenant being compelled to leave by

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the dangerous condition of the drains, fraudulently concealed by the landlord, was held not liable for the rent.

In *Dyett v. Pendleton*, 8 Cow. 727, the landlord habitually brought lewd women into another apartment under the same roof, and this was held equivalent to an ejection. Senator Spencer said: "Suppose the landlord had established a hospital for the small-pox, the plague or the yellow fever in the remaining part of this house; suppose he had made a deposit of gunpowder under the tenant, or had introduced some offensive or pestilential materials of the most dangerous nature; can there be any hesitation in saying that if by such means he had driven the tenant from his habitation, he should not recover it," etc.

In *Gilhooley v. Washington*, 4 N. Y. 217, the landlord let lower apartments to others, and they were occupied for prostitution, drinking, etc., but it was not shown that they were let for such purposes, nor that he connived at or consented to such use, and the tenant was held liable for the rent. And in *De Witt v. Pierson*, 112 Mass. 8; s. c., 17 Am. Rep. 58, the same was held, although the landlord promised but neglected to correct the matter.

If the landlord conceals the fact that the house has been used for prostitution, the tenant may counterclaim damages. *Rhineland v. Seaman*, 13 Abb. N. C. 455.

In *Carstairs v. Taylor*, L. R., 6 Ex. 217, the landlord occupied the upper part of the house, and collected the water from the roof into a tank, whence it was discharged by a pipe. A rat gnawed a hole in a tank, and the tenants' goods were wet. Held, that the landlord was not liable.

In *Cleves v. Willoughby*, 7 Hill, 17, the complaint was of the landlord's removal of a cistern which was on the premises at the time of the letting, and this was held to justify a refusal to pay rent. But the court said, *obiter*, that there was no implied covenant of tenantability.

In *Sutton v. Temple*, 12 M. & W. 52, the demise was of the estate of a field, and it was held that there was no implied warranty of fitness. The same was held in *Brakins v. Adams*, L. R., 8 Ch. App. 756; s. c., 6 Eng. Rep. 594. But in *Eaton v. Winnie*, 20 Mich. 156; s. c., 4 Am. Rep. 377, Eaton was in occupancy of Winnie's land as a licensee, and pastured infected sheep on it. After Eaton removed his sheep, Winnie turned in his, and they contracted the disease. Winnie was ignorant of the infection, and Eaton had informed him that there was no danger. Eaton was held liable.

In *Edwards v. N. Y., etc., R. Co.*, 98 N. Y. 245; s. c., 50 Am. Rep. 659, it was held that on a lease of a building for public exhibitions, there was no implied warranty that the galleries should be secure against falling with a turbulent crowd.

The mere existence of a bad and unwholesome smell does not justify abandonment. *Sutphen v. Seebass*, 14 Abb. N. C. 67; *Coulson v. Whiting*, 14 Abb. N. C. 60; even if the lessor knew the fact and did not disclose it. *Coulson v. Whiting*, *supra*.

The tenant may abandon where his family are sickened by an escape of sewer gas by defective plumbing. *Bradley v. Goicouria*, 67 How. Pr. 76; but if he remains he must pay rent, even where it is a furnished house. *Chadwick v. Woodward*, 13 Abb. N. C. 441. See *Boreel v. Lawton*, 90 N. Y. 298; s. c., 43 Am. Rep. 170, to the latter effect.

CALDER V. SMALLEY.

(88 Iowa, 219.)

Negligence — dangerous sidewalk.

A lot owner in a city, constructing and maintaining a scuttle hole in the sidewalk in front of his lot, and covering it so insecurely that a passer is injured, is liable to him therefor, whether the scuttle-hole was authorized by the city or not, and although the tenant had agreed to keep the scuttle closed.

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

Brannan, Jayne & Hoffman and J. Carskadden, for appellant.

Richman, Burke & Russell, for appellee.

BECK, C. J. The petition alleges that defendant owns a certain house and lot, situated upon Second street, in the city of Muscatine; that the cellar under the house extends into the street, under the sidewalk, in which defendant made a scuttle-hole to be used for putting wood in the cellar; that the covering of the hole was negligently constructed, being laid down without fastenings, upon planks which were not nailed; that plaintiff, while passing upon the sidewalk over the cellar, without fault or negligence upon her part, stepped upon the covering of the scuttle-hole, which gave way, and she fell into the hole, and thereby received the injuries to recover for which she brings this suit.

The defendant, in his answer, denies the allegations of the petition, and as a special defense avers, that if plaintiff is entitled to recover upon the cause of action pleaded in the petition, the city of Muscatine, and not defendant, is liable therefor, inasmuch as it is the duty of the city, assumed by ordinance, which is set out in the answer, to construct and keep in repair all sidewalks therein. A demurrer to the count of the answer pleading the special defense was sustained.

In an amended petition plaintiff alleges that defendant wrongfully, and without authority, made the covered excavation under the sidewalk; and that the cover thereof was properly used by the public as a sidewalk. A demurrer by defendant to this amendment

was overruled. Evidence was introduced by each party tending to support his or her side of the several issues.

The first objection to the judgment discussed by defendant's counsel is based upon the petition, that if plaintiff has any remedy for the injury she sustained, it should be pursued against the city, which is alone liable. Counsel to support this objection, rely upon *City of Keokuk v. Independent Dist. of Keokuk*, 53 Iowa, 352; s. c., 36 Am. Rep. 226.

In our opinion the distinction between that case and this is obvious. In that case the injury for which recovery was sought resulted from the dangerous and defective condition of the sidewalk itself, the construction and repair of which the city, under authority assumed by ordinance, was empowered to require; in this the alleged injuries were caused, not by a defective sidewalk, but by a defective scuttle and cover, which were constructed for the private use of defendant, either with or without the authority of the city. If constructed and maintained without authority of the city, the scuttle and cover constituted a nuisance, and defendant is liable for all injuries resulting therefrom. If constructed and maintained with such authority, defendant is liable, in the absence of the care in their construction and repair required by law. See *Dill. Mun. Corp.*, §§ 699, 1032, 1034; *Com. v. Boston*, 97 Mass. 555; *Congreve v. Morgan*, 18 N. Y. 84; s. c., 72 Am. Dec. 495; and cases cited in *City of Keokuk v. Independent Dist. of Keokuk*, 53 Iowa, 352, 357; s. c., 36 Am. Rep. 226.

It will be observed that the petition bases the claim for recovery both on the ground that the scuttle and cover were made and maintained without authority, and that they were negligently constructed. We need not inquire whether the city may be liable as well as defendant. It is sufficient for the purpose of this case to hold that defendant is liable for injuries received by plaintiff, caused by defective construction of the scuttle and cover, and that the rule of *City of Keokuk v. Independent Dist. of Keokuk*, does not apply to the facts of this case.

It may be said, in reply to the argument of defendant's counsel upon this point, that the case is that of the unauthorized or negligent use of a sidewalk; and that the cover of the scuttle cannot be regarded, as claimed by counsel, as only a part of the sidewalk. The negligent or unauthorized use of the sidewalk as a cover for the scuttle rendered defendant liable for the injuries, just as he

would have been liable in case he had in a like manner used for his own private benefit, a part of the sidewalk for any other purpose.

The District Court instructed the jury, in substance, that defendant would not be liable as for a nuisance in constructing and maintaining the scuttle and cover, if the city consented thereto, which may be implied from use by the defendant, and acquiescence without objection by the city, with knowledge on the part of its officers of the use of the sidewalk for such purpose. Counsel for defendant insist, that as the evidence shows without conflict the use of the sidewalk with implied assent of the city, the case, as to the issue of fact involved in this point, should have been withdrawn from the jury and they should have been directed that defendant was not liable as for a nuisance. Let it be admitted, for the purpose of the argument, that counsel's position is correct, yet it does not follow that the judgment should be reversed.

We cannot presume that the jury, upon the issue in question found against the evidence and instruction of the court for plaintiff; but if it be found that their verdict may be supported under the evidence and instructions of the court pertaining to the other issues, we will presume that their verdict was based thereon. It thus appears, that even if the court erred in not taking from the jury the case, so far as the issue involving the question of nuisance is concerned, it is error without prejudice.

Counsel for defendant insist that there is no evidence tending to show that the scuttle and covering were negligently constructed. We are not of that opinion. It was shown that the covering was without fastenings, and subject to be removed by any person. The jury, we think, could well have found that it was negligent to leave the covering in that condition; that the care required by the law, for the safety of those who frequented the street, demanded that such a trap should not be arranged for them in the sidewalk, which could be readily set by the mischievous and malicious, and would be set by the negligent who would fail properly to replace the cover after using it.

The defendant proposed to prove by his own testimony that the tenant of the house had agreed to keep the scuttle closed. The evidence was not admitted, of which defendant now complains; but the defendant, on his cross-examination, did testify to the same fact. As the evidence was in this manner introduced to the jury,

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no prejudice resulted from excluding it upon the examination in chief. But the evidence was immaterial. Plaintiff seeks to recover either upon the ground of the negligent construction of the scuttle and cover, or on the ground that they were constructed without authority from the city. It is obvious that in either case defendant cannot escape liability upon the ground that another undertook to keep the cover upon the scuttle.

[Omitting minor points.]

In our opinion the judgment of the District Court ought to be affirmed.

Judgment affirmed.

EMERSON V. BABCOCK.

(66 Iowa, 267.)

Highway — obstruction — scales.

The owners of a town lot may not maintain hay-scales in the street in front of his premises, when the fee of the streets is in the town.

ACTION to restrain the city marshal from removing hay-scales from the street. The defendant had judgment below.

R. F. Askren, for appellant.

Laughlin & Campbell and *Henry & Spence*, for appellee.

ROTHROCK, J. It is averred in the petition that "said scales are not and never have been an obstruction to said street in any particular, neither have they been so declared by any court, but on the contrary, plaintiff avers that they have always been a great benefit to the public and that they were put in said place at the first laying out of said town. Plaintiff states further that said order (the order of removal) was procured through the hatred, ill-will and malice of designing men, for the purpose of harrassing and injuring him in his business, and for no other purpose." The demurrer was upon the ground that the facts pleaded do not entitle plaintiff to any relief.

It appears from an exhibit attached to the petition that the town council passed an ordinance requiring the removal "of any platform scales standing on or occupying a portion of the land set apart

as a public thoroughfare, known as Decatur street," in said town, and it sufficiently appears from the petition and exhibit that plaintiff's scales are located on Decatur street. Section 4089 of the Code provides that "the obstructing or incumbering by fences, buildings or otherwise, the public highways, private ways, streets, alleys, commons, landing-places, or burying grounds, are nuisances;" and by section 456 of the Code, the town council has power to cause any nuisance to be abated.

The fee title of the streets is in the incorporated town, and no private person has any legal right to erect any structure therein for the purpose of carrying on his private business; and if, having done so, he is required to remove his building or structure, of whatever it may be, from the street, he has no cause of complaint. He is deprived of no right. If the plaintiff was permitted to maintain his scales in the street for a time, the privilege must be regarded as a mere license which may be terminated at any time, and it is immaterial whether the erection in the street amounts to a nuisance. It is the duty of the town authorities to keep the streets clear and unobstructed, and no person has the right to take and hold possession of any part of the streets for any private purpose.

It is true that in the case of *Everett v. City of Council Bluffs*, 46 Iowa, 66, this court held that shade trees growing in a street or highway do not constitute a nuisance, unless they are an obstruction to public travel. The trees in question in that case were within the curbing of the sidewalk of the street. That decision was based largely upon the consideration that shade trees at proper places upon the edge of the streets of cities and towns are a public benefit, and no detriment to any public interest. The maintenance of any structure in a street for the purpose of carrying on a business occupation presents quite a different question.

We think the demurrer to the petition was properly sustained.

Judgment affirmed.

Bryant v. Burlington, Cedar Rapids and Northern Railway Company.

BRYANT V. BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

(88 Iowa, 288.)

Master and servant — ordinary risks of employment.

A fireman on a railway locomotive must take the risk of "bucking snow."

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The defendant had judgment below.

Stoneman, Rickel & Eastman, for appellant.

S. K. Tracy and W. G. Thompson, for appellee.

SKEVENS, J. The evidence tended to show that during two days previous to the accident there prevailed an unusual snow-storm, accompanied by a severe wind, and it was very cold. No train had passed over the road for twenty-four hours because of the cold weather and snow-drifts. On the day of the accident the train in question arrived at Traer from the north. It was a passenger train pulled by two engines, and to the forward engine a snow-plow was attached. The plow was left at Traer, and the train, drawn by two engines, proceeded south, and about five miles from Traer the accident occurred. The pilot on the forward engine had the space therein filled with strips of wood. A gang of shovellers started from Traer before the train, with orders to clear the track. They arrived at the place of the accident a short time prior to the train. The track was in good condition but for the snow-drifts, and the train was in all respects properly equipped, except that there was no snow-plow, and it was drawn by two engines. At the place of the accident there was a snow-drift which possibly was two feet deep on one rail, and six inches on the other. It was packed so hard by the force of the wind that it bore the weight of a man. Intermingled with it was dirt and gravel. The drift could be seen by the employees on the train, as they approached it, for a mile at least.

The train was run into the drift at a faster speed than trains were ordinarily run on the road, but there is no evidence tending to show that such rate of speed was greater than ordinary when "bucking snow." Both engines left the track because the snow

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was so compact that probably the forward one "lifted; that is, was raised above the track by the snow. There can be no doubt under the evidence that the engines left the track because of the snow, and any other finding should have been promptly set aside because unsupported by the evidence. Such being the material, and we may say, undisputed facts, did the court err in directing the jury to find for the defendant? or in other words, is there any evidence of negligence?

In this latitude, storms of more or less severity, like the one in question, frequently occur. It is a duty railroad companies owe to the public to remove snow from the track, and operate the road as soon as it can be done, by the exercise of great diligence, and the use of all the means and appliances at their command. The company has the undoubted right to adopt such methods for that purpose as its best judgment may dictate. It may be that it would not have the right to adopt doubtful experiments. Experience has undoubtedly demonstrated in what manner the required duty can be best performed. Such methods, it must be assumed, are known to the company and its employees. The latter therefore when they undertake the performance of any duty which requires them to engage in "bucking snow," assume the usual and ordinary hazards of their occupation; and if the effort to remove the snow by that method is made in the manner in common use, they have no right to complain if an accident occurs. *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465; *Nalor v. Chicago & N. W. Ry. Co.*, 53 Wis. 661, and authorities cited; *Howland v. Milwaukee, L. S. & W. R. Co.*, 54 Wis. 226.

The material question therefore is, whether there is any evidence of negligence in this case. The burden to establish it was on the plaintiff. There is no evidence which tends to show that the train in question was not equipped in the ordinary manner. It seems to be assumed by counsel for the appellant that it was negligence to start the train without a snow-plow and with two engines, but this cannot be so unless this was an unusual mode, and there is no evidence which so shows. On the contrary, we are impressed that the mode adopted on this occasion is usual and ordinary on all well-conducted roads in this latitude. The defendant would not be justified in relying on shovellers to remove such obstruction, yet it did what it could in this direction. Snow can only be expeditiously removed by the use of trains, and as we can readily see, when so engaged the

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train must be run at such speed as will overcome the resistance of the snow-drift. There is no evidence which tends to show that the speed of the train in question was greater than it should have been for the purpose of accomplishing the passage of the train. It is true the engineer on the forward engine saw this drift; and as there is no evidence to the contrary, it must be assumed that he was a careful and competent engineer. He undoubtedly knew there was some danger incurred in running his engine and train into the drift. This danger he shared with other employees; and it must be presumed that he would not have done so if he thought he incurred danger of bodily harm. The evidence does not show that the drift in question was unusual. There was not therefore any thing to warn the engineer that the hazard was greater than is ordinarily incurred by train employees when engaged in "bucking snow."

[Omitting a minor question.]

Judgment affirmed.

BECK, O. J., and REED, J., dissenting.

WILMASER V. CONTINENTAL LIFE INSURANCE COMPANY.

(66 Iowa, 417.)

Insurance — life — diverting fund by will.

One whose wife is insured for the benefit of another may not divert the fund by his will.

ACTION by an executrix to recover premiums paid by her testator for life insurance. The opinion states the case. The defendant had judgment below.

Fred. Heinz, for appellant.

Thurston & Hall, for appellee.

REED, J. It is alleged in the petition that in 1870 the defendant issued to the decedent, Francis S. Wilmaser, a policy of insurance on his life, by which it agreed, in consideration of the payment by him of certain premiums during his life-time, to pay to his daughter, Clara M. Wilmaser, the sum of \$1,300 after his death, and that during his life-time he paid to defendant the sum of \$425.13, as

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premiums on said policy; and that before his death he made a will, which has been admitted to probate, by which he devised to said Clara M. the sum of \$500, on condition that she would assign to his estate all her right and interest under said insurance policy, and which also contained a provision which directs his executrix, in case Clara M. shall decline to make such assignment, to assert a claim against defendant for the amount of the premiums paid by him on the policy. It is also alleged that the executrix has tendered to said Clara M. the amount of said devise, and requested her to assign the policy, but that she had declined to make such assignment, and the prayer is for judgment for the amount of the premiums paid by the testate on the policy.

We entertain no doubts as to the correctness of the ruling of the Circuit Court on the demurrer. The policy constituted a contract between the insured and the defendant, by the terms of which defendant was bound, on the payment by him of the premiums, to pay the stipulated sum to the beneficiary at his death. One of the defendant's undertakings by the policy was to pay the stipulated sum. Another was to pay it to the beneficiary named. The promise to pay the amount of the policy to Clara M. Wilmaser is as certainly a part of its undertaking as is the promise to pay the sum named; and it clearly is a material part of it. The will of the insured cannot have the effect to alter the contract in any of its material parts, for the undertakings of one of the parties to an agreement cannot be changed without his consent by any act of the other.

When the death of the insured occurred, the conditions precedent to defendant's liability to the assured had all happened. From that moment she had a valid claim upon it, by the terms of the policy, for the amount of money which it had covenanted to pay her, and its liability in that regard was in no manner affected by the will.

Judgment affirmed.

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VERMILYA V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

(88 Iowa, 608.)

Railroad — right of way — right to take sand.

Under a deed to a railway company of a right of way "for all purposes connected with the construction, use and occupation of the railway," the company has no right to take sand from the land conveyed to build a round house.

ACTION for value of sand. The opinion states the case. The plaintiff had judgment below.

George E. Clarke, for appellant.

Stanbury & Clark, for appellee.

BECK, C. J. I. The evidence tended to prove that the sand for which recovery is sought in this action was taken from within the limits of the defendant's right of way upon plaintiff's land. It was used in the construction of the engine-house, or round-house, located at the point where defendant's main line of road intersects the branch road passing over plaintiff's land, where the sand was procured. The right of way was by quit-claim deed granted by plaintiff to the Mason City & Minnesota Railway Company, under which defendants acquired it by grant. The language of the deed executed by plaintiff, showing the subject conveyed, is as follows: "We * * * do hereby grant, bargain, convey and quit-claim to the Mason City & Minnesota Railway Company, for all purposes connected with the construction, use and occupation of said railway, the right of way over and through the following described tract or parcel of land (describing it). Hereby conveying, for the use above mentioned, a strip of land 100 feet in width across the premises aforesaid, to have its center in the center of the main railway track, on the line that is now located, and on which said railway is to be constructed, together with all necessary width for berms."

The Circuit Court held, in ruling upon a demurrer to defendant's answer, and in instructions to the jury, that defendant ac-

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quired no right under plaintiff's deed for the right of way to take and appropriate the sand for the purpose of building the round-house, and that for the value of the sand used for that purpose defendant is liable in this action. The decision of the court below upon this point of the case first demands consideration.

II. Plaintiff's deed conveys "the right of way" over the land described by the words "right of way." The words "for all purposes connected with the construction, use and occupation of said railway," indicate the purposes for which the right of way is to be used, thus limiting the grant. These purposes must be connected with the construction, use and occupation of the road contemplated — not of any other road. The words "right of way" describe an easement upon plaintiff's land, under which the possession of the land may be held. This easement is to be held for all purposes connected with the construction, use and occupation of said railway. Now the building of a round-house has no connection with the construction, use or occupancy of a railway which could have been within the contemplation of the parties to the deed. It is true that every transaction of the corporation organized to construct, use and operate a railway has some connection with the object of their organization. The building of cars, the erection of depots, ware-houses, and the like, are all connected with the use of the railway in some degree. But it cannot be presumed that plaintiff had in contemplation matters of this kind. It would be absurd to suppose that plaintiff, in making the deed, had in contemplation that the easement — the possession of the land granted — would be held for the purpose of enabling defendants to build a round-house at Mason City, St. Paul, or in Dakota. If the easement extended to such work in Mason City, where the round-house was built for which the sand was taken, it would extend to all like work upon defendant's road, without regard to the remoteness thereof. This court has held that the employment of one rendering services at a round-house, demanded by its proper use, is not connected with the use and operation of the railroad. *Malone v. Burlington, C. R. & N. Ry. Co.*, 61 Iowa, 326; s. c., 47 Am. Rep. 813.

Code, § 1241, provides that a railway corporation "may take and hold under the provisions of this chapter so much real estate as may be necessary for the location, construction and convenient use of its railway, and may also take, remove and use, for the con-

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struction and repair of said railway and its appurtenances, any earth, gravel, stone, timber or other materials on or from the land so taken." The chapter in which this section is found contains provisions for the condemnation of lands for use in the construction of railroads. Here we have, in effect, a statutory definition of the word "use" applied to railroads. We are here informed the "convenient use" of a railroad does not mean the construction of appurtenances thereto. If it does have such meaning, then the grossest tautology is found in the language of the statute. The section, in the first place, provides that land may be taken for the "convenient use" of the railroad; and then declares that materials found upon the land may be used for the construction of appurtenances thereto. The term "convenient use" means the fit, appropriate, advantageous use. The adjective "convenient" does not limit the name "use," so as to make it apply to the actual running of trains upon the tracks. That is done by virtue of the meaning of the word itself. The use of a thing is not the use of an appurtenant thereto. The use of a thing may be convenient, and the use of its appurtenances may be convenient. We discover that the word "use," occurring in the statute, has the same meaning as the same word found in the plaintiff's deed. But in the statute the use of a railroad does not mean the use of its appurtenances. Hence, when plaintiff granted the right of way for the use of the railroad, he did not grant it for the uses of appurtenances. A round-house is an appurtenance of the railroad.

Defendant, it may be admitted, by proceeding under the statute to condemn the land, would have acquired the right to use the material found on the land for the purposes of constructing appurtenances to the railroad. But that course was not pursued, and it was content to accept a conveyance granting less. That plaintiff could grant less and defendant accept less, cannot be doubted. We must conclude that it was the intention of the parties that the deed of plaintiff should convey nothing more than the right of way for the use of the road, and not for the use of appurtenances thereof. When the right of way is acquired by *ad quod damnum* proceedings under the statute, the title of the timber, sand, and the like, found upon the land, remains in the owner, and can be used by the corporation owning the railroad only for purposes connected with its construction and use. See *Preston v. Dubuque & P. R. Co.*, 11 Iowa, 15; and *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288.

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III. The defendant, in the third count of its answer, pleaded a counter-claim against plaintiff for sand taken by him from the land occupied by defendant's right of way over his land. A demurrer to this count was rightly sustained. Defendant does not allege that plaintiff interfered with its use and occupancy of the land for the purposes for which it was granted — the operation of the railroad. It simply complains of the taking of the sand, for the reason that it was conveyed by the plaintiff's deed. While it is alleged that the whole of the strip of land covered by the easement was necessary for the occupancy of defendant in the use of the road, it is not alleged that such use or occupancy was interfered with. We have seen that the deed of plaintiff did not convey the land further than was necessary for these purposes. Defendant held but an easement; the plaintiff retained title to the land subject to the easement. If the sand could be reserved without interfering with defendant's easement, plaintiff as the owner of the fee could do it. Defendant's counter-claim does not show that this could not be done. Upon this point see *Preston v. Dubuque & P. R. Co.*, 11 Iowa, 15, and *Henry v. Dubuque & P. R. Co.*, 2 Iowa, 288, above cited.

IV. At the risk of repetition, we will endeavor to state in different language and in another form our conclusions upon the points of the case above considered: (1) The deed under which defendant claims the land in controversy conveys to it an easement "for all purposes connected with the construction, use and occupation of the railway." (2) All the other rights to and interest in the land, except this easement were reserved by plaintiff. (3) The construction of a round-house is not one of the uses for which the land was conveyed, and defendant has no easement authorizing it to appropriate the land, or the sand found thereon, to such purposes. That the conveyance of the land "for the construction, use and occupation of the railway" vests in defendant no such authority and right is made plain by the consideration that in the statute authorizing the condemnation of land for the use of railways the word "use" can have no meaning or effect extending it so as to authorize the corporation acquiring rights thereunder to appropriate sand, timber, stone or the like. The statute (Code, § 1241), in express language, other than by the words used in the deed to defendant executed by plaintiff, empowers corporations, under the authority conferred upon them, to exercise the right of eminent domain; to appropriate for the construction and use of

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railways materials found upon lands condemned by them. No right to make such appropriations is granted by the deed to defendant in this case. It was not therefore acquired by defendant. It is obvious that decisions involving the right of corporations acquired by virtue of condemnation of land, authorized by statute, conferring authority upon them to take and use timber, sand, stone and the like, are not applicable to this case. In such cases the railroad companies acquire under the statute something more than the mere easement to use the land for the purpose of constructing and operating their roads; namely, the right to take timber, sand and the like. In this case such easement was conveyed by the deed to defendant and nothing more.

V. We present below a brief statement of the facts and points ruled in the cases cited as being in conflict with our views, which shows that none of them construes conveyances of the character of the one under which defendant acquired the right of way involved in this case. All of them that in any way pertain to the rights of railroad companies are cases wherein lands were condemned under statutes. One of them, *Chapin v. Sullivan R. Co.*, 39 N. H. 564, it will be observed supports the conclusions we reached in this case. The others are in no manner in conflict with our views.

Boston Gas-light Co. v. Old Colony & N. R. Co., 14 Allen, 444. The plaintiff sought to prevent the obstruction of a right of way by defendant by the erection of buildings "within the limits of the location of its railroad." The fee of the land occupied by the railroad was in defendant, which it acquired under its charter. It was held that plaintiff had no right to restrain the erection of the buildings.

Com. v. Inhabitants of Haverhill, 7 Allen, 523. It was held that the authorities of a city cannot lay out a way across land occupied by a railroad, unless permission to do so has been granted by the county commissioners.

Brainard v. Clapp, 10 Cush. 6; s. c., 58 Am. Dec. 74. This was an action to recover for trees cut down on the right of way of a railroad in order to remove an obstruction to the view of a track near a depot. The land occupied by the railroad was acquired under the charter of the company and by condemnation, pursuant to law. Held, that the corporation could remove the trees.

Chapin v. Sullivan R. Co., 39 N. H. 564. It was held that stone excavated in constructing a branch railroad, under a grant, or per-

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missive license of the owners to construct and use the track upon the land, remains the property of the landowner, if not used in the construction of the identical branch track, and cannot be devoted to any other purpose by the railroad company.

Aldrich v. Drury, 8 R. I. 554; s. c., 5 Am. Rep. 624. Land was acquired by condemnation proceeding, under the statute, by the railway company. It was held that the corporation under this proceeding acquired the right to use the earth, gravel and stone needed for the construction and maintenance of the road within the location, and to carry the same from one point to another along the road, as such use should demand.

Taylor v. N. Y. & L. B. R. Co., 38 N. J. L. 28. The right of way was acquired by condemnation under the statute. Held that trees upon the land condemned under the statute could be used in constructing the railroad.

New York & C. R. Co. v. Gunnison, 1 Hun, 496. Lands cannot be condemned by a railroad company simply for the purpose of removing gravel therefrom.

Hasson v. Oil Creek & A. R. Co., 8 Phila. 556. The defendant acquired right of way under the statute. It was held that plaintiff retained the fee of the land, and had the right to drive pipes under the railroad to convey oil.

Munkers v. Kansas City, etc., R. Co., 60 Mo. 334. Under a relinquishment of the right of way along a section line, it was held that the company would not lose its right for the reason that the railroad was not constructed immediately on the section line. Rights and liabilities as to surface water were involved in the case.

Smith v. Chicago, etc., R. Co., 67 Ill. 191-197. Various questions arising under condemnation proceedings are decided. The case does not bear upon the question before us.

Hurd v. Rutland, etc., R. Co., 25 Vt. 116. The land was condemned under a statute. It was held that the right of the railroad corporation to the use and possession of the land is exclusive. The land-owner had no right to its use or occupation. Nothing is said about the right of the corporation to take stone, timber, or other material for use on its road for any purpose or any other road.

Connecticut & P. R. Co. v. Holton, 32 Vt. 43. Lands were taken by condemnation under the statute. It was held that the land-owner had no right to enter upon or use the land for any purpose which in the least degree endangers or embarrasses its use by

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the railroad company; as for the removing of turf, which would enhance the danger of cattle getting on the track. The opinion expressly declines to consider the possible case of a land-owner entering "to obtain mines or minerals, or to take herbage or other vegetable growth." The turf which defendant removed, it was held, was necessary to be retained upon the road in order to prevent dust arising, which would be an annoyance to travellers.

Troy & B. R. Co. v. Potter, 42 Vt. 205. The road was surveyed and located, and this under the charter of the company was an appropriation or "taking" of the land. The defendant was the president of the railroad company, and testified to certain agreements as to the right he reserved to enter upon the right of way and take herbage. Held that the land was taken by condemnation under the statute, and that the company acquired all the rights they could acquire by payment of damages to the owner assessed under the statute.

Burnett v. Nashville & C. R. Co., 4 Sneed, 528. A statute provided that the land condemned for use of a railroad shall vest in the company "in fee-simple." Held that the railroad company acquired under the statute an absolute estate in fee-simple.

Chicago & M. R. Co. v. Patchin, 16 Ill. 198; s. c., 61 Am. Dec. 65. Action to recover for cattle and hogs killed by the plaintiff's engines. The case does not show whether the railroad company obtained the right of way by condemnation or by grant. Judge SCATES, in the opinion, says, *arguendo*: "I presume the right to the land upon which railroads are built is not strictly analogous to the easement of the public highways, leaving the fee in the owner of the soil, but is an absolute ownership in fee for the railroad purposes, and that characteristic or incident of a public highway has relation alone to the business of the company as common carrier upon it."

Munger v. Tonawanda R. Co., 4 N. Y. 349; s. c., 53 Am. Dec. 384. The right of way was acquired under the statute—the charter of the defendant. Held, that the defendant acquired the title to the lands. The action was brought to recover the value of oxen killed by defendant's trains.

VI. ROTHROCK, J., concurs in the foregoing conclusions, upon the ground that in his opinion the railroad company did not acquire the right under the deed to remove the sand for the purpose of building a round-house at a junction with another road owned

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by defendant. He does not deem it necessary to inquire whether such a right would be acquired by condemnation of the right of way under the statute, or by grant of the right of way in the language of the statute pertaining thereto. He is of opinion that under the deed executed for the right of way, the railroad company was authorized to take possession of all the land covered by the grant, and inclose the same with fences. If that were done the land-owner would have no right to interfere with the possession. He could not rightfully enter upon the premises for any purpose. He could require a farm-crossing to be made for his convenience, and over it could cross the railroad. But he could only go on the right of way by committing a trespass in tearing down the fences. In his opinion, the railroad company having the right to take actual possession of the whole width of the right of way, such possession is exclusive; and so long as it does not remove the sand or earth for any purpose not authorized by the law, or by the grant, the land-owner cannot enter upon the land to remove sand, or for any other purpose. He concurs in the conclusion, that as it is not shown by the record that the right of way was inclosed, the plaintiff was not a wrong-doer in taking the sand therefrom.

[Minor points omitted.]

We have considered all question discussed by counsel, and reach the conclusion that the judgment of the Circuit Court ought to be affirmed.

Judgment affirmed.

GWYNN V. DUFFIELD.

(88 Iowa, 708.)

Negligence — of druggist — partners — contributory.

The plaintiff applied at the store of the defendants, apothecaries, for extract of dandelion. One of the defendants, by mistake, took down a jar of belladonna, which was correctly labelled, took the required quantity from it, and was wrapping it up, when the plaintiff put his knife into the jar, took out a small quantity on the point, and asked him if that was a proper dose, and he replied that it was. He thereupon swallowed it, and was poisoned and suffered injury. *Held*, that neither of the defendants was liable.

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

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*Hopburn & Thummel and James McCabe, for appellants.**Clark & Parslow and C. S. Keenan, for appellee.*

ADAMS, J. This case is before us upon a second appeal. The former decision is reported in 61 Iowa, 64; s. c., 47 Am. Rep. 803. The facts as now presented are nearly the same as before. It is not important that we should undertake to point out specially the difference. We will say in a general way that the evidence shows that the defendants, H. P. Duffield and S. B. Duffield were partners in business as apothecaries; that the plaintiff went into their store and called for the extract of dandelion; that S. B. Duffield undertook to put up for him a quantity of the drug called for; that in doing so he made a mistake, and put up the extract of belladonna, and delivered the same to the plaintiff; that none of the drug however thus put up and delivered was swallowed by the plaintiff, and it is not claimed that any liability arose by reason of such sale and delivery; that the dose which produced the injury was not put up by the defendants, or either of them, nor was it delivered by the defendants, or either of them, to the plaintiff; that the plaintiff helped himself to the same from a jar standing upon the defendants' counter; that the jar had been taken from the shelf by S. B. Duffield and placed upon the counter, and the drug put up was taken from that jar by him, under the mistaken supposition that it was the extract of dandelion. So far the evidence is clear, and there is no ground for controversy. But it is not quite clear whether S. B. Duffield said or did any thing by reason of which he became responsible to the plaintiff for the character of the drug taken and swallowed by him, nor whether if he did, the plaintiff was guilty of contributory negligence.

The plaintiff's testimony in regard to the transaction in which the injury was received is as follows: After speaking of the drug which he ordered of S. B. Duffield, and which he paid him for, he said: "As he was doing it up, I said, 'I feel bad now, and believe I will take a dose of that here,' and reached out like I would take a dose out of the box (being a small box in which he was putting up the drug). He had got the lid on, and rather I suppose than take the lid off the box he motioned toward the jar and said, 'take it out of that.' I had out my knife, and reached over and took out about as much as I had been in the habit of taking, and

asked him if that was too much, and he smiled and said, 'no, that will not hurt you; you might take more than that and it would not hurt you.' I took it on the point of my knife and put it in my mouth."

The testimony of S. B. Duffield in relation to the transaction is in these words: "The first that I saw or knew of Gwynn's taking any of it was when he was in the act of doing so. I have no recollection of his speaking to me about it. I gave him no permission to take it, and did not sanction it."

The foregoing statement in respect to the evidence is sufficient to enable us to consider certain instructions given by the court, of which the defendants complain.

[Omitting a minor point.]

II. The court gave an instruction in these words: "If the jury find from the evidence that the defendants were in the conduct of the business of apothecaries, and you further find that while in the line of such business the plaintiff called for an extract of dandelion, and that in response thereto one of the defendants negligently produced for the plaintiff the extract of belladonna, and that the same was a deadly poison, and that through the said negligence of the defendants, the plaintiff was led to believe that the compound was the extract of dandelion, and that the plaintiff was induced to take a dose of the same under such belief, without any fault or neglect upon his part, and as the direct cause of the taking of such poison the plaintiff became sick, to his injury, then you should find for the plaintiff." The giving of this instruction is assigned as error. The court doubtless intended to be understood that if the jury found the facts mentioned in the instruction they should find for the plaintiff as against both defendants. But there is no pretense that the defendant H. P. Duffield had any thing to do with the transaction personally. If he became liable, his liability arose, not from his own act, but that of his partner. But as we have seen, it was not the drug sold which produced the injury. It was what the plaintiff helped himself to from the jar while S. B. Duffield was doing up the package sold. According to the plaintiff's testimony it was what S. B. Duffield consented to his taking as a gift. Now whatever duty of care S. B. Duffield may have owed him in such a transaction, the firm did not owe him any, unless giving away goods was a part of the firm business, and there is no evidence that it was. In our opinion the instruction cannot be sustained.

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The court gave an instruction in these words: "The mere taking of medicine from a jar which had been designated by the defendant as containing the drug called for, in the presence of the defendant, and with his knowledge, and not from the portion taken out by the defendant, would not, of itself, alone considered, exonerate the defendants from liability; but should it further appear that it was taken under such circumstances as to preclude the defendant from the exercise of his knowledge and discretion as a druggist, or under such circumstances as would cause it to appear that the plaintiff acted upon his personal knowledge of the nature and quality of the drug, independent of the knowledge of the defendant, the defendants would not be liable." The giving of this instruction is assigned as error.

The plaintiff testified, in effect, that he took the drug under the permission of S. B. Duffield. The latter denied such permission. If he is to be believed, the plaintiff was a trespasser; and if a trespasser, he cannot be allowed to set up his own ignorance, and say that he relied upon S. B. Duffield's knowledge, and was misled by his mistake. The instruction precluded the consideration of the defendant's theory of the case, which was supported by evidence that the jury might have believed. That a person trespassing upon the property of another cannot recover for an injury sustained through the negligence of the owner in respect to such property, unless the negligence was wanton, or evinced an indifference to the safety of others, appears to us to be well settled. *Bush v. Brainard*, 1 Cow. 78; s. c., 13 Am. Dec. 513; *Baltimore, etc., R. Co. v. Schwindling*, 101 Penn. St. 258; s. c., 47 Am. Rep. 706; *Gillespie v. McGowan*, 100 Penn. St. 144; s. c., 45 Am. Rep. 365; *Morrissey v. Eastern R. Co.*, 126 Mass. 877; s. c., 30 Am. Rep. 686; *Hargreaves v. Deacon*, 25 Mich. 1; *Severy v. Nickerson*, 120 Mass. 306; *O'Keefe v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 467; *Vanhorn v. Burlington, C. R. & N. Ry. Co.*, 63 Iowa, 67. In *Parker v. Portland Pub. Co.*, 69 Me. 173, it was held that even a licensee could not recover. In our opinion the instruction cannot be sustained.

Judgment reversed.

BECK, C. J., dissenting. The Circuit Court failed to present the theory of the defense, so far as it is based upon the claim that plaintiff was trespassing upon the property of defendants when he took the poison. There is a satisfactory answer to this objec-

tion, based upon this ground: In my opinion, there is no evidence whatever tending to support the allegation of defendant's answer to the effect that defendant was a trespasser, or guilty of wrong in taking the poison. The plaintiff, in his evidence, declares that he took it upon the explicit direction of defendants. The defendant who had the transaction with plaintiff testifies, substantially, that plaintiff came to defendants' store and asked for dandelion. After some conversation as to price and quantity of the drug desired by the plaintiff, the defendant proceeded to put up belladonna instead of dandelion. While the poison was being put up, plaintiff took from the jar, whence defendant had taken the drug, a dose. No assent thereto was given by defendant, nor did he object. He testifies that he saw plaintiff taking the drug from the jar, and that nothing was said by either party. Surely it cannot be said that plaintiff, according to defendant's own testimony, was guilty of a trespass, or what the law would consider a wrong. The defendants kept the drug for sale. Plaintiff served himself instead of asking defendants to serve him, and took the identical drug which the defendants had indicated to be the medicine he wanted. But it is said that he took what he had not purchased. This is not correct. He had bargained for a specified quantity, and while that was being put up took a small quantity in addition thereto. Here clearly arose an implied promise to pay for what he took, if it was worth any thing. The transaction was in fact a sale of the dose taken by plaintiff.

It cannot be claimed that upon the facts of the case defendants could have sustained an action against plaintiff for a trespass, or for wrongfully taking, or could have successfully prosecuted him for a theft. Such proceedings, if attempted, would not have been successful, and no greater success ought to attend defendants' endeavor to escape liability for their negligence on the ground of the trespass or wrong of plaintiff in serving himself to a poison which defendants had indicated to be the medicine which he desired to take. It may not be a usual thing for the patrons of a drug-store, or of a mercantile establishment, to "help themselves" to drugs or goods. But I am quite sure that the transaction, as disclosed by the evidence of the defendant and the undisputed facts of the case, was not and cannot be considered a trespass or wrong upon the part of the plaintiff. It is not disputed that the plaintiff and defendants lived in the same village, and were acquaintances of more or

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less intimacy, and that plaintiff had before made purchase of defendants of dandelion, and that the act of plaintiff was not at the time treated by defendants as an unusual or improper thing. The most that can be said of it is that plaintiff's acts exhibited a degree of familiarity which is not uncommon among acquaintances.

I reach the conclusion that as there was an utter absence of evidence to support the defense based upon plaintiff's "trespass," or wrong, the Circuit Court did not err in failing to present the issues involved therein to the jury, or to instruct them thereon. These views sufficiently answer all that is said in the opinion of the majority in regard to the trespass and wrong of plaintiff, in which I cannot concur.

CASES
IN THE
COURT OF APPEALS
OF
WEST VIRGINIA.

DIMMEY V. RAILROAD COMPANY.

(27 W. Va. 22.)

Negligence—causing death of wife—suit by husband, administrator.

Where a married woman is killed by negligence, her husband, as administrator, may maintain an action of damages therefor.

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

Caldwell & Caldwell and Russell & Stifel, for plaintiff in error.

W. P. Hubbard and L. S. Jordan, for defendant in error.

JOHNSON, President. This is an action on the case brought in August, 1882, in the Circuit Court of Ohio county. The plaintiff is the administrator of his deceased wife, Mary T. Dimmey. The action was brought under the statute which authorizes an action against any person or corporation for the killing of a person. The declaration has three counts, in each of which it is alleged, that through the negligence of the defendant, which was at the time a street railroad company with its cars drawn by horses, the plaintiff's intestate was thrown from one of the cars of defendant and killed. The defendant by counsel demurred to the declaration and

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each count thereof, which demurrer was overruled, and the defendant pleaded not guilty.

The jury rendered a verdict.

A motion was made by defendant to set aside the verdict and grant it a new trial, which motion was overruled, and judgment on January 12, 1885, was entered on the verdict with interest from the date of the judgment.

To the judgment the defendant obtained a writ of error and *superseas*.

The first error assigned is, that the court overruled the demurrer to the declaration. It is insisted that the husband, as administrator of his deceased wife, who brings this action, cannot maintain the same; and to sustain the proposition the following authorities are cited: *Laughlin v. Eaton*, 54 Me. 156; Schouler's Dom. Rel. 170; Cooley Torts, 117; *Southworth v. Packard*, 7 Mass. 95; *Ballard v. Russell*, 33 Me. 196; s. c., 54 Am. Dec. 620; *Dandridge v. Minge*, 4 Rand. 403; *Caperton v. Gregory*, 11 Gratt. 505; *Harrison v. Gibson*, 23 Gratt. 312; *City v. Trowbridge*, 5 W. Va. 353; *Holton v. Daly*, 106 Ill. 181; *Lynch v. Davis*, 12 How. Pr. 323.

In *Laughlin v. Eaton*, 54 Me. 156, it was held, that the well-established doctrine of the common law, that a married woman cannot sue alone for malicious prosecution, has not been changed by the Maine statute. BURROWS, J., said: "The well-known doctrine of the common law is that where a wrong is committed against the person of the wife during coverture, by beating her, slandering her reputation or by malicious prosecution, she cannot sue alone. For injuries to the wife occasioning to the husband a deprivation of the society of his wife or of her assistance in his domestic affairs, or by which he is put to expense, he may have his separate action, as where a violent battery has caused a long continued illness of the wife, or expense in her case, or if she be maliciously indicted, and thereby separated from him or he be put to expense in her defense. But if the action is brought for her personal suffering and injury, the husband and wife must join, and care should be taken not to include in the declaration a statement of any cause of action, for which the husband alone would be entitled to recover."

In *Southward v. Packard*, 7 Mass. 95, it was held, that a release of damages by the husband for the personal abuse of his wife is a good bar to join action by husband and wife for the same cause.

In *Danbridge v. Minge*, 4 Rand. 403, it was held that where the

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rights of the wife appear clearly in the record, it is the duty of the court *ex officio* to protect her against any injurious effects arising from the acts or admissions of her husband, whether the point was made in the pleading or not; that a bill by the husband and wife is the husband's suit only, and the wife is joined for conformity, to be bound only so far as in justice she ought to be bound.

In *Harrison v. Gibson*, 23 Gratt. 312, it was held that a bill by husband and wife in right of the wife is the bill of the husband, and the wife is only joined for conformity. The coverture of the wife is therefore no excuse for delay in bringing the suit.

In *City of Wheeling v. Trowbridge*, 5 W. Va. 353, it was held that where an action is brought by the husband and wife for a wrong to the wife, there can be no recovery for what is special damage to the husband; that the wife may join with her husband, where she is the meritorious cause of the action, and where the right of action would survive to her, if the husband died before the amount of damages was recovered; otherwise where the husband alone is entitled to damages, and in the case of his death they should go to his personal representatives. In that case one count in the declaration alleged damages to the husband; another count alleged damages in a case where the wife was the meritorious cause of the action. It was held that a demurrer to the declaration should be sustained because the different causes of action were united in the same declaration.

In *Holton v. Daly*, 106 Ill. 131, Michael Daly brought an action against Charles C. Holton, for injuries caused by the bursting of an emery wheel. The cause was tried and a verdict rendered against the defendant for \$5,000. At a subsequent term judgment was entered on the verdict. The judgment was reviewed by the Appellate Court, and the case remanded for a new trial. Subsequent to this Michael Daly died intestate and Mary Daly, administratrix of the estate, was substituted as plaintiff; and thereupon the defendant by counsel moved to dismiss the action as one not surviving to the administratrix, but the court overruled the motion and the defendant excepted. The case was again tried and verdict and judgment were rendered for \$4,000, and the case taken to the Appellate Court. The court held that under the act of 1853, giving an action to a legal representative of a deceased person to recover damages, in case the death of the intestate was caused by the wrongful act, neglect or default of another, the cause of action is the wrongful act,

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default or neglect of the defendant, causing the death, and not merely the death itself; that in such a case no damage can be allowed for the bodily pain and suffering the deceased underwent, and his inability, after receiving the injury, to attend to his affairs generally, and for medical attendance and nursing; that the damages recoverable are purely such as arise from pecuniary loss to the widow and next of kin; that injuries to the person not resulting in death in case of the death of the injured party from some other cause will come under the act of 1872, and survive the personal representative; that an action brought by a party to recover damages for a personal injury caused by negligence on the part of the defendant, and for pain and suffering caused thereby and for lost of time and capacity to earn a livelihood and for nursing and medical attendance, where the injury complained of results in his subsequent death before judgment, does not survive to his personal representative, but it will survive if his death is from some other and different cause.

Lynch v. Davis, 12 How. Pr. 323, was an action by a husband as administrator of his deceased wife for malpractice by the defendant, who was a physician and surgeon, by which the wife was killed. The court held the action could not be maintained. HARRIS, J., said: "If the cause of action stated in the complaint is to be regarded as a breach of the obligation implied in the employment of the defendant as a physician the right of action was vested in the plaintiff, as the husband of his wife and not as administrator. The contract to perform his professional duty in a skillful manner was made with the husband and not the wife. In an action founded on this breach of duty the husband might recover the damages he had sustained by reason of the loss of the society and aid of his wife. * * * If the action had been founded upon the wrong committed by the defendant and the personal suffering that resulted to the wife, she could not have sued alone if living, but the husband must have been joined as plaintiff with her. 1 Chitt. Pl. 73. It would indeed have been the action of the husband, though the wife being the meritorious cause must have been joined with him as plaintiff. Upon the death of the wife, the cause of action, so far as it related to her, did not survive at common law. The act of 1847 (Sea. Laws 1847, p. 575), upon which the plaintiff relies, gives an action to the personal representative of the persons injured and dying, when the person so injured, if living, might have maintained an action, and recovered damages for the same injury. * * *

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There is nothing in the language of the act referred to which would warrant such an action. The wife, if living, could not have maintained an action for the injury."

Counsel for the defendant in error insists, that the action can be maintained, and that the demurrer was properly overruled, and cites *C. B. & Q. R. R. Co. v. Dunn*, 52 Ill. 260; 1 Min. Inst. 350; 1 Chitty Pl. 83; 1 Selw. N. P. 208; Saunders Pl. & Ev. 196; *City v. Trowbridge*, 5 W. Va. 353; *Norcross v. Stuart*, 50 Me. 87; *Saltmarsh v. Condia*, 51 N. H. 71; *Pettingill v. Butterfield*, 45 N. H. 195; *Chapman v. Rothwell*, 96 Eng. C. L. 168; *R. Co. v. Sullivan*, 59 Ala. 272; *Morrison v. Bucksport*, 87 Me. 353; *Plankroad v. Chamberlain*, 32 N. Y. 659; *Dickens v. R. Co.*, 28 Barb. 41; *Green v. R. Co.*, 31 Barb. 260; *Bream v. Brown*, 5 Cold. 168; *Steel v. Kurtz*, 28 Ohio St. 191; *R. Co. v. Whitten*, 13 Wall. 270; *Tilley v. R. Co.*, 24 N. Y. 474; *Same v. Same*, 29 N. Y. 252.

Mr. Chitty, in his Treatise on Pleadings, p. 83, says: "Where an injury is committed to the person of the wife during coverture, by battery, slander, etc., the wife cannot sue alone in any case, and the husband and wife must join, if the action be brought for the personal suffering or injury to the wife, and in such case the declaration ought to conclude to their damage, and not to that of the husband alone; for the damages will survive to the wife, if the husband die before they are recovered; care must be taken not to include in the declaration by the husband and wife any statement of the cause of action for which the husband alone ought to sue; therefore after stating the injury to the wife, the declaration ought not to proceed to state any loss of assistance or expenses sustained in curing her."

In *Norcross v. Stuart*, 50 Me. 87, it was held, that an action in the name of husband and wife for injuries sustained by her survivor, the husband may withdraw; that the administrator may come in and prosecute; that in such case the husband cannot be considered a party after the death of the wife, but if made her administrator, he may prosecute in that capacity. KENT, J., in delivering the opinion of the court said:

"This action was instituted by the husband and wife against the defendant as a common carrier of passengers for injuries sustained by the wife alone. The only ground for damage set forth in the declaration is the alleged injuries to the person of the wife. The wife has died since the entry of the action. The husband has been

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appointed administrator of her estate. A motion was filed setting forth the facts of the death of the wife, and declaring as the ground of the motion to dismiss the action that it cannot be prosecuted by the husband as survivor, and that the cause of action does not survive, and that there is no provision of law authorizing the appearance of an administrator to prosecute the suit. This motion was sustained, *pro forma*. This action survives, if there are proper parties to prosecute it. *Hooper v. German*, 45 Me. 209.

* * * Assuming the position of the defendant's counsel to be correct, the husband is but an enabling party, a side supporter, and not an actor. He is only required to be joined by reason of the marriage relation, which considers husband and wife one, and which does not allow the wife to sue alone. He may be likened to a guardian in whose name an action is brought for his ward. * * * In this case we think that the husband, being a mere nominal party in effect, having no right to be in the writ except as aid and supporter of his wife and as one with her, dies as a party when his wife dies, and may therefore withdraw as the husband, to allow the administrator to come in."

The judge cited two cases, which fully sustain the decision. *Pattie v. Harrington*, 11 Pick. 221, in which it was held, that if pending an action brought by husband and wife to recover a debt due to the wife when sole the wife dies, and the husband takes out administration on her estate, he may come in and prosecute the suit as administrator; and *Crozier v. Bryant*, 4 Bibb, 174, where it was held that an action brought by a husband and wife to recover slaves, claimed in right of the wife against a person having adverse possession previous to the marriage, is on the death of the wife properly revived in the name of her administrator, the property never having been reduced into possession by the husband during the coverture.

To the same effect is *Saltmarsh v. Candia*, 51 N. H. 71, where it was held that a suit brought by husband and wife for a personal injury to the wife cannot be prosecuted by the husband after the wife's death, but may be prosecuted by the wife's administrator.

In *C., B. & Q. C. Co. v. Dunn*, 52 Ill. 260; s. c., 4 Am. Rep. 606, it was held that the right of action accruing by reason of personal injuries received by a married woman by negligence of a railroad company is property, and coming to her from a source other than her husband, in good faith, it is her separate property and comes

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under the operation of the act of 1861; that such right of action being the separate property of the wife, she may sue alone to recover damages for the injury received; that the right of action in such case being in the wife, the husband cannot without her consent adjust it or release it; but the action having been brought in the joint names of the husband and wife, and the husband having, as the agent of his wife, for a certain consideration compromised the suit and agreed to dismiss it and release the cause of action, it was held that such release operated as a bar to subsequent action for the same injury brought in the name of the wife alone. BREWER, C. J., delivering the opinion of the court, said: "The act of 1861 was evidently designed to relieve married women from some of the disabilities the common law had for centuries imposed upon them. By force of that law the maxim obtained, that husband and wife are one person, and although property be the wife's, the husband is the keeper of it, being the head of the wife. Co. Litt. 112. These maxims were law in this State up to the comparative modern date of February 21, 1861, at which time it was enacted by the legislature, that:

"All property, both real or personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith, from any person, other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall notwithstanding her marriage, be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

"The rule in construing remedial statutes, though it may be in derogation of the common law is, that every thing is to be done in advancement of the remedy, that can be done consistently, with any fair construction that can be put upon it. Impressed with the force of this course of interpretation, this court, soon after the enactment of this statute, not in terms giving the wife the power to sue alone in matters affecting her separate property, held, that to render the act operative and effectual for the purposes intended by it, it was indispensable she should have this right, and accord-

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ingly sustained an action of replevin brought by a married woman, to restore to her the possession of personal property, being her own separate property, which had been seized by a constable, on an execution against her husband. *Emerson v. Clayton*, 32 Ill. 493. It was there said the right to her property being vested in the wife, by statute, it must, if the act is to be enforced, so remain until she consents to dispose of it, for this right includes full dominion over it; when then these rights are the only rights affected on the well established principles of law, she must bring suit for the invasion of them. * * * The only object of the statute was to keep her separate property out of the control of her husband. If this were not so, the act would be futile and of no effect. The husband, for purposes of his own, might refuse to join in an action with his wife. He might connive with others to dispossess her of her property. The right of sole control over the separate property of the wife by her includes the power to do whatever is necessary to the effectual assertion and maintenance of that right." After an able argument to show that a right of action is property, he concludes that branch of his opinion by saying: "We are satisfied this right of action is properly included in the words 'all property;' it was the separate property of the wife acquired during coverture, and from a source other than her husband, and she alone controls it."

In *Diakens v. N. Y. Cent. R. Co.*, 28 Barb. 41, it was held contrary to *Lynch v. Davis*, 12 How. Pr. 323, that an action can be maintained under the act of 1847, "requiring compensation for causing death by wrongful act, neglect or default," by an individual as administrator of his deceased wife, whose death was caused by the negligence of the defendant, although the deceased left no father or mother or defendants surviving her. *Lynch v. Davis* was decided at the Rensselaer Special Term, June, 1855, and *Dickens v. Railroad Co.*, *supra*, in July, 1858.

In 1859 the case of *Green v. Hudson R. R. Co.*, 31 Barb. 260, it was again held that an action can be maintained under the act of 1847, by an individual as administrator of his deceased wife, whose death was caused by the negligence of the defendant, on a complaint alleging that the deceased left a mother, who was her next of kin, surviving her. In this case, BACON, J., said: "As an original question, I confess my impressions would be strongly against the maintenance of this suit."

In *Wiley v. Hudson R. R. Co.*, 29 N. Y. 252, the suit was brought

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by William Lilly, as administrator of his deceased wife for damages, and there was a recovery of verdict and judgment, which was affirmed by the Court of Appeals. The same case was before the court and reversed in 24 N. Y. 474. Such a suit was sustained by the Supreme Court of Ohio. *Steel v. Kurtz*, 28 Ohio St. 191, ASHBURN, J., says: "No question is made on the record as to the right of the plaintiff to maintain the action, and we will take it for granted by the parties that the case is one where if Isabella Lotz had survived the injury she could have maintained the action. In such case the statute says: 'Then and in every such case the action shall be maintained in the names of the personal representatives, for the exclusive benefit of the widow and next of kin of such deceased person.'"

The case of *Railway Co. v. Whitten*, 13 Wall. 270, was of the same character, and arose under the statute of Illinois.

In *Bream v. Brown*, 5 Cold. 168, it was held, that where the plaintiff's intestate being sick sent a written prescription prepared by a physician, for certain medicines to the defendants, who were druggists and prescriptionists; and that Evans, a clerk of the other defendants, prepared the prescription so negligently and carelessly, that he mixed other medicines that were poisonous, which were taken by the intestate, and from the effects of which she died, that the personal representative of the deceased could maintain an action against the defendants for the wrong and injuries to the intestate. The action was brought by Philip Bream, as administrator of his deceased wife, for the use of himself and Catharine and Bridget Bream, minor children of Bridget Bream, deceased. The provisions of the Tennessee Code under which the action was brought, is: "In all and every case where any person shall come to his death by injuries received from another, whether the same were inflicted feloniously or not; for which injuries, in case death had not resulted, an act of damages would lie at law, the personal representative thus killed shall have the right to institute a suit for damages in either of the Circuit Courts in this State," etc. This was the act of 1850, and at the time of the decision was embodied in the Code as follows: "The right of action which a person who dies of injuries received from another, or where death is caused by the negligent acts or omissions of another, would have had against the wrong-doer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his per-

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sonal representatives for the benefit of his widow or next of kin, free from the claims of creditors." The court, in its opinion by SHACKLEFORD, J., said:

"The intention of the legislature was to protect the life of the citizen by giving compensation in damages against the party for the commission of wrongful or negligent acts. * * * The act of 1850 was passed altering the common law, and giving the right to sue to the personal representative in the case of death. * * * It is insisted that the word person does not include the wife, as this section, by its terms, means the deceased must have left a widow and next of kin; that section 2291 is explained by section 2292; that in the term (next of kin) in the last section referred to the language is: 'The action may be brought by the personal representative of the deceased for the benefit of the widow and children, and if he decline it the widow and children may bring it. * * * In other words that the statute provides for the death of a man and not a woman.' * * * To this construction we cannot assent. * * * The language is very broad, the word person being used includes all classes, and every one is embraced, who if death had not ensued could have maintained an action. * * * Could the wife in this case have sued, if she had survived the injury, and permanent health resulted? By the common law the wife could not sue alone. She had to join with her husband; if the husband died the right survived to her. By provision of section 2291, if the person injured had a right to sue, the action shall not abate. By reason of the coverture the wife cannot sue alone, she must join with her husband; but the right of action springs from and out of her; the husband is the means by which that right is enforced. As in the case of infants, who must sue by their guardian or next friend, and so in all the relations of life where persons are under disabilities. The injury inflicted was to the wife. Can it be doubted that if she had lived she could have maintained the action? The proposition is too plain for argument, the courts are alike open to the wife as well as to the husband. Where their rights are not antagonistic, they must join, but where they are opposed, the law gives the remedy."

In *Railroad Co. v. Sullivan*, 59 Ala. 272, it was held: "The compensation given by the act does not go to the husband, wife or child of the deceased, as such, but becomes assets of the estate not subject to the payment of debts, and must be distributed as the

personalty of an intestate is now distributed. The damages given must be recovered by the personal representatives of the decedent. That a release given by the husband to a corporation by whose wrongful act or omission the wife was killed is no bar or defense to an action brought by her representative to recover damages."

So in England, under the Stat. 9 & 10 Vict., chap. 93, it was held, that one as administrator of his deceased wife could maintain an action against the defendant by whose negligence her death was caused.

This action is brought under sections 5 and 6, of chap. 103 of the Code, which read as follows:

"*Fifth.* Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default, is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

"*Sixth.* Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties, and in the proportions provided by law in the relation to the distribution of personal estates, left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding \$5,000, and the amount so recovered shall not be subject to any debts or liabilities of the deceased; provided that every such action shall be commenced within two years after the death of such deceased person."

There is no doubt that these sections only authorize an action in the name of the administrator of the person who has been killed through the wrongful act or neglect of another, when if death had not ensued the party injured might not have maintained an action for such injury. The party injured is clearly the party killed, and if such party, had not death ensued, could not have maintained an action for the injury, neither can the administrator of such party maintain an action for the death of such party caused by the wrongful act or neglect of the party killing him or her. At common

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law, if death were instantaneous, no action could be maintained for such wrongful act or negligence. But if death did not at once ensue, the party injured had his action for the damages suffered. At common law, if the party injured were a married woman, the husband could sue alone for the loss of the society and aid of his wife, and for expenses about her cure; and the wife, being the sufferer, was the meritorious cause of another action, which the husband and wife together might maintain; and if pending the action the husband died, the action did not abate but survived to the wife (1 Chit. Pl. 83); and if pending the action the wife died, the action did not abate, but the husband stepped aside, and it prosecuted to the end by the administrator of the wife. *Norcross v. Stuart*, 50 Me. 87; *Pattee v. Harrington*, 11 Pick. 22; *Crozier v. Bryant*, 4 Bibb, 174. But for the fact that the married woman at common law, in a case where she was the meritorious cause of the action, was under disability, and the fruits of the action would go to her husband, she might have sued alone, I am not prepared to say that under our statute she could sue alone for an injury to herself, nor do I think it necessary to decide in this case, whether she could or not; but she could certainly have joined with her husband and brought an action for the cause set out in the declaration, if death had not ensued from the injury. But a single case, so far as I know, holds that under such circumstances where death ensued, the administrator of the wife could not maintain the action. That case is *Lynch v. Davis*, 12 How. Pr. 323. It has not been followed in New York, and to my mind its reasoning is very unsatisfactory.

We have cited a number of pertinent authorities, which hold that the action may be maintained. It would be strange indeed if the legislature intended that for every death by the wrongful act, neglect or default of a person or corporation, an action might be maintained, except for the killing of married women. The object of the statute was in part at least for the protection of human life, and it would be a reproach to the legislature to suppose that no one would be held to answer in damages for the killing of married women, but should be held to answer for the killing of every other person. We are asked to so construe this statute, because it is insisted, had death not ensued, the married woman could not alone sue for the injury. The statute does not say that only the party injured could sue. The language is, where the wrongful act, neglect or default "if such as would (if death had not ensued) have

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entitled the party injured to maintain an action to recover damages in respect thereof."

The declaration is good, and the demurrer was properly overruled.
[Omitting other points.]

Judgment affirmed.

BERNS V. GASTON GAS COAL COMPANY.

(27 W. Va. 285.)

*Master and servant — negligence — mining — precautions against fire-damp —
fellow-servant's negligence.*

The owner of a mine is not bound to employ the most expensive precautions against fire-damp, but only to use reasonable efforts for ventilation.

If the owner of a mine has negligently allowed fire-damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp, instead of a safety-lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner.

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

A. F. Haymond, for plaintiff in error.

J. W. Mason and *J. Bassel*, for defendant in error.

JOHNSON, President: Charles Berns, an infant, by Charles Berns, his next friend, brought an action on the case in June, 1881, in the Circuit Court of Marion county against James O. Watson, A. Brooks Fleming and James Boyer, partners doing business as the Gaston Gas Coal Company. There were three counts in the declaration, to which declaration and to each count thereof the defendants demurred, and the court sustained the demurrer as to the first count and overruled it as to the other two counts. We will not examine the first count. The second and third counts, which are substantially the same, alleged in substance that the defendants were owners of a certain coal-mine in the county of Marion and were digging coal therefrom. The counts with considerable particularity described the mine, and averred that in said mine "large quantities of fire-damp, gases, fumes and vapors collected in and remained in said mine in said main drift or heading and in said

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lateral drifts or rooms, so that the safety of the lives and limbs of persons serving the defendants in and about their said coal-mine, and while in such service going into said main drift or heading and into said lateral drifts or rooms, was dependent upon the care with which the said mine and the said main drift or heading and the said lateral drifts or rooms were ventilated and made free from said fire-damp, gases, fumes and vapors, whereof the defendants had full knowledge, whereby it became the duty of the defendants for the safety of the persons so serving them to have the said coal-mine and the said main drift or heading and the said lateral drifts or rooms carefully ventilated and made free from said fire-damp, gases, fumes and vapors." The declaration alleges that on March 27, 1880, plaintiff was in the employment and service of the defendants in said mine driving mules, hauling coal out of said mine on a tram-road, and it became necessary for him as such servant to go into the main drift or heading, and into the lateral drifts or rooms; that it was the duty of the defendants to have said mine, main drift or heading and lateral drifts or rooms well ventilated and free from said fire-damp, gases, fumes and vapors; that while he was thus engaged in the service of the defendants on March 27, 1880, by reason of the carelessness and negligence of the defendants in permitting the said fire-damp, etc., to be and remain in said mine, the said fire-damp, etc., exploded with great power and violence and ignited and burned with great heat, by means whereof the plaintiff was greatly burned, wounded and bruised on both of his hands and on the back part of his head, and was otherwise injured and was crippled and lost the use of his hands, etc. He laid his damages at \$5,000.

The demurrer being overruled, the defendants, Watson and Fleming, who had been served with process, pleaded not guilty. The judge of the Circuit Court of Marion county being so situated as to render it improper for him to preside at the trial, by consent of parties the case was removed to the Circuit Court of Taylor county for trial. On August 3, 1883, the trial was commenced and continued from day to day until August 9, when a verdict was rendered against the defendants for \$2,000 damages. The defendants moved to set aside the verdict, because contrary to the law and the evidence and because of after-discovered testimony. The second ground was supported by affidavits. The motion was overruled. Three bills of exceptions were taken to the rulings of the court, the

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entitled the party injured to maintain an action to recover damages in respect thereof."

The declaration is good, and the demurrer was properly overruled. [Omitting other points.]

Judgment affirmed.

BERNS V. GASTON GAS COAL COMPANY.

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*Master and servant—negligence—mining—precautions against fire-damp—
fellow-servant's negligence.*

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The demurrer being overruled, the defendants, Watson and Fleming, who had been served with process, pleaded not guilty. The judge of the Circuit Court of Marion county being so situated as to render it improper for him to preside at the trial, by consent of parties the case was removed to the Circuit Court of Taylor county for trial. On August 3, 1883, the trial was commenced and continued from day to day until August 9, when a verdict was rendered against the defendants for \$2,000 damages. The defendants moved to set aside the verdict, because contrary to the law and the evidence and because of after-discovered testimony. The second ground was supported by affidavits. The motion was overruled. Three bills of exceptions were taken to the rulings of the court, the

first and second to the admission of evidence, and the third, which certifies all the evidence, to the refusal to set aside the verdict and grant a new trial.

To the judgment the defendants, Watson and Fleming, obtained a writ of error with *superedeas*.

[Omitting minor considerations and details of evidence.]

What is the liability of a master for the injury to his servant by his neglect? The terms negligence and ordinary care are correlative terms. What constitutes ordinary care depends on the circumstances of each particular case. It is such care as a person of ordinary prudence would exercise under the circumstances. *Railroad Co. v. Ownsby*, 30 Gratt. 455. The measure of care against accidents which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use, if his own interests were to be affected, and the whole risk were his own. *Nitro-Glycerine case*, 15 Wall. 524.

In *Laning v. Railroad Co.*, 49 N. Y. 521; s. c., 10 Am. Rep. 417, it was decided that the duty of the master to the servant is to furnish proper, perfect and adequate machinery or other material and appliances necessary for the proposed work and to employ skillful and competent fellow-servants, or to use due and reasonable care to that end.

In *Gibson v. Railroad Co.*, 46 Mo. 163, it was held, that the legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. If he fails to do so, he is guilty of a breach of duty under his contract, for the consequence of which in justice and sound reason he ought to be responsible.

Spelman v. Fisher Iron Company, 56 Barb. 151, was an action brought against a corporation by one of its laborers employed in blasting for an injury occasioned by the premature discharge of a blast loaded with a newly invented powder, which he was directed to use by the defendant's foreman or superintendent. The complaint alleged that the company furnished the powder for use in its ordinary and appropriate business; that its superintendent directed its use by the plaintiff in such business; that it had never been used as an explosive in blasting and was in fact unfit and unsafe for such use; and that the plaintiff was ignorant of its dangerous properties; it was held on demurrer that a right of action was unquestionably stated; also that the plaintiff under his contract assumed the risk of personal injury in blasting with the ordinary

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appliances and for that purpose, but not these risks attendant upon the use of an unusual, untested and exceedingly dangerous article, which could not be tamped without inevitable explosion, which dangerous quality was unknown to him; that it was gross negligence in the company to furnish such an article for the laborer's use without giving him information in that particular, whether the company was aware of its dangerous quality, or furnished it for use without having taken any steps to obtain such knowledge.

In *Sowden v. Mining Company*, 55 Cal. 443, it was decided, that in an action by an employee for injury incurred in the course of the employment, the court below having at the request of the plaintiff instructed the jury, that "the servant assumes no risk, except such as existed at the beginning of the employment, and such as are incidental to the business," the court should have added words equivalent to "or which existed during the course of the employment of which the employee had knowledge or was bound to have knowledge."

In *Johnson v. Bruner*, 61 Penn. St. 58, it was decided, that where an injury happens to a servant in the course of his employment, the master is responsible, if it was caused by his negligence, but if it was the result of the hazardous nature of the employment, he is not liable, unless his negligence was the direct and proximate cause of the injury. An employer does not impliedly guarantee the absolute safety of his employees. In accepting, the latter is assumed to have notice of all patent risks incidental thereto, or of which he is informed, or of which it is his duty to inform himself, and is assumed to undertake to run such risks.

In *Sykes v. Packer*, 99 Penn. St. 465, the plaintiff was injured by a fall from a building, which he was helping to construct, which fall was occasioned by the removal of certain tackling. The court below charged, that if the defendant caused to be removed a support essential to keep the building in position without notifying the plaintiff, and the plaintiff did not know of such removal, and it was improper to cause such removal, then the defendant was guilty of negligence. *Held*, this was error; the jury should have been instructed, that if the defendant acted in good faith in directing the removal of the tackle, believing according to the best of his judgment that there was no danger in so doing, he was not guilty of negligence. They should also have been instructed, that the omission of the defendant to notify the plaintiff of the removal of the

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tackle did not constitute negligence, as the plaintiff must be held to have been cognizant of that which was clearly visible to his sight.

In *Coal Co. v. Healer*, 84 Ill. 127, it was held, that under the statute of Illinois the widow was entitled to recover damages for the death of her husband caused by a fire in the mine, which was purely accidental, for the neglect to have a second means of escape as required by the statute. See also *Bartlett Coal and Mining Co. v. Roach*, 68 Ill. 174, and *Litchfield Coal Co. v. Taylor*, 81 Ill. 590.

A workman employed in any dangerous occupation takes it with all ordinary risks. The master is bound to provide for the safety of his workmen, as far as can be reasonably expected, and he must not use any art to conceal dangers, but he is not obliged to take more care of his servant than he would be expected as a prudent man to take of himself. If a workman reasonably apprehends danger from any particular acts, he may decline to do them. If he willingly or wilfully encounters dangers which are known to himself, or which are notorious, the master is not responsible. Thus a coal-owner will not be liable for accidents from explosions of gas found in the due course of working, or from irruptions of water, if ordinary precautions have been taken by him. But a master is bound to protect his workmen against unnecessary risks in works of danger. Bainbridge on Mines and Minerals (Am. ed.), 468.

Is it necessary for a master to have the best machinery in his works, or is it sufficient that he has machinery and appliances that are reasonably safe? In *Devitt v. Railroad Co.*, 50 Mo. 302, it was held, that if principal has been guilty of fault or negligence either in providing suitable machinery or in the selection or employment of agents or servants, and injuries arise in consequence, he must respond in damages. But when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment, he assumes the risk and cannot hold his employer for the consequences. *Railroad Co. v. Bishop*, 50 Ga. 465.

In *Payne v. Reese*, 100 Penn. St. 301, it was decided, that an employer is not bound to furnish for his workmen the safest machinery nor to provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employee, it is all that can be required of the employer.

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In *Railroad Co. v. Gildersleeve*, 33 Mich. 133, it was held that an employer cannot properly be held to be under so strict obligation to his servants, as to be required under all circumstances to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such and to supply its place with something better and safer. In that case, the company were using an old mail-car, which was lower than the other cars and more difficult to couple, and the plaintiff's intestate was killed while attempting to couple such low car with a higher one. COOLEY, C. J., in delivering the opinion of the court said: "The car which was the cause of the injury in this case was not in itself dangerous, or unfit for use. In coupling it with other cars peculiar caution was requisite, making it more liable to cause injury than would be a car of modern construction. Its use therefore made the employment more dangerous than it otherwise would be. In that particular the case may be compared to that of a farmer, who with knowledge on the part of himself, and those in his employ, that a horse he has had in use is disposed to be fractious, and unmanageable, continues nevertheless to use him in his business. It may be compared to that of a merchant, who continues to make use of a fluid for light, when something else which is within his reach has been demonstrated by experience to be safer. So far as we can perceive the case of the manufacturer would not be different in principle, who would continue the use of a building which, in the event of a conflagration would subject his employees to greater risks than one of different construction. * * * Now any rule on this subject must be a general rule, and not one to be applied to railroad companies alone. It will be perceived that the risk in this case was such as would affect only the person employed, and that whatever duty was imposed by the circumstances upon any one, could have reference only to such persons. The case is consequently divested of any question except such as would concern the relation of master and servant, and the same rule would govern the case that would govern were the questions to arise between the farmer, the mechanic or the manufacturer and the person in his employ. And treating it as a question of such broad application, we do not perceive any ground upon which the plaintiff's case can safely be planted which comes short of this; that the employer is under obligation to his servants under all circumstances to make use of the safest known appliances and instruments, and is responsible for any failure to

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discard what is not such, and to supply its place with something safer. Any doctrine so far reaching as this, would be manifestly destructive of the general rule, and would almost make the employer the guarantee of his servants' safety in his employ. But under any less severe responsibility, it would be impossible to sustain a judgment against this defendant upon the sole ground of a failure to discontinue the use of this car. In any light in which the question can be viewed, no breach of duty can be charged against the defendant, unless it be the duty to make the employment as safe for the persons employed as was possible. Certainly in making use of this car no confidence which was reposed in the prudence and caution of the employer has been betrayed.

The difficulties, as here stated, were fully known and understood and the intestate voluntarily continued to encounter the risk."

In *Leonard v. Collins*, 70 N. Y. 90, it appeared, that the servant was killed by the fall of an overhanging portion of a bank of earth, which was being excavated under the direction of the master. It was held error to charge the jury to the effect, that if the defendant could have done any thing which would have prevented the accident, his omission to do so was negligence. The court in its opinion said: "The court in this case charged the jury that it is the duty of an employer to take all reasonable care of his workmen and therefore if they should find "that the defendant was guilty of any negligence—omitted to do any thing by which the life of the plaintiff's intestate could have been preserved, he would be liable. It was for the jury to say whether all things considered there was any thing which the defendant could have devised to have prevented the accident; whether there was any thing in his experience and familiarity with that kind of business which would have suggested to him there was any special danger against which he ought to take special care."

The defendant at the conclusion of the charge excepted to the following instruction to the jury: "If the defendant could have done any thing to preserve the life of the deceased, that he should have done it," and the judge qualified it by saying, "Perhaps preserve the life is susceptible of criticism. I meant to say any thing that could have prevented the accident." The defendant excepted to the charge as qualified. We are of opinion that the judge erred in this instruction. That the defendant could have done something which would have prevented the accident cannot be doubted.

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But this was not the test of his liability. The question was: Was he negligent? Did he exercise ordinary care and prudence in conducting the excavation in view of the position of the deceased, the probable consequences which would result from the falling of the overhanging earth, while the intestate was below? The error in the charge was calculated to mislead the jury upon a material point, and was not, we think, cured by the other instructions given."

Man must earn his bread, therefore he must labor. To procure labor, he must of course enter the employment of others. If capitalists were held to be insurers of the lives of those who enter their service in their various industries, whether in operating railroads, in constructing buildings, in various sorts of mining operations, and in all the multifarious ways by which money is made, these industries would languish, and many more laborers would be out of employment, and the laboring poor would suffer infinitely more than now. Therefore it has been found necessary to adopt reasonable rules for ascertaining the responsibility of the master for injuries to the servant.

We here state some of the rules:

When a servant enters into the employment of a master, he assumes all the ordinary risks incident to the employment, whether the employment is dangerous or otherwise.

The master must provide for the safety of his servant, as far as can reasonably be expected under the circumstances; but he is not obliged to take more care of his servant than a prudent man would be expected to take of himself.

If a servant willfully encounters dangers, which are known to him or are notorious, the master is not responsible for an injury occasioned thereby.

The measure of care, which a master must take to avoid responsibility for injury to his servant, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.

Diligence and ordinary care are correlative terms. What constitutes ordinary care depends on the circumstances of each particular case. It is such care as a person of ordinary prudence would exercise under the circumstances.

If the master has been guilty of negligence in failing to procure suitable appliances or machinery for the carrying on of his business, and injuries result therefrom to his servants, he must respond

in damages, unless the servant, well knowing the default of the master in this respect, enters upon the employment or continues therein after such knowledge, in which case he assumes the risk and cannot hold the master for the consequences; but if the servant knows the defect and has reasonable ground to believe that the master has cured or will immediately cure the defect, he is not guilty of negligence by remaining in the service and may recover for injury caused by such negligence of the master.

The master is not bound to furnish for his workmen the safest and best machinery, nor to provide the best methods for the work in which he engaged, to save himself from responsibility for injury to his servant. If the machinery or appliances which he has be of an ordinary character, and such as can with reasonable care be used without danger to the employee, it is all that can be required of the employer.

The owner of a coal mine is not required to resort to the most expensive methods for keeping his mines free from fire-damp in order to escape responsibility for injury to his servants working in the mines caused by the explosion of the fire-damp. If he has reasonably safe methods in use for the proper ventilation of the mine, and uses reasonable care to keep the mine properly ventilated and the fire-damp expelled therefrom, he will not be responsible. He is not held to extraordinary care.

Any different rule from this last one would be disastrous to mining interests. If every proprietor of coal mines should be held responsible for all injuries to his servants caused by the explosion of fire-damp, unless he procured all the new and expensive machinery which might be invented to prevent such explosions, the result might be that a monopoly in mining would be created, because none but heavy capitalists would be able to procure the new machinery.

[Omitting evidence.]

By admitting this evidence the court virtually instructed the jury, that if the defendant could have so ventilated the mine by forcing in air by machinery (a process so unusual, that a miner of twenty years' experience had never seen it tried), as to have expelled the fire-damp and kept the mine free therefrom, and thus have prevented the explosion, he was guilty of negligence in failing to do so. Upon the authorities which we have cited, and according to reason and the rules which have been laid down, the admission

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of this evidence was error to the prejudice of the defendants, for which the judgment will have to be reversed and a new trial awarded.

As the case will have to be remanded for a new trial, we will not speak of the weight of the testimony, as it may be different on the next trial; but as no instructions were asked, and there is no other case in the books, so far as my research extends like this, we deem it proper to discuss another question presented by counsel for plaintiff in error, not as it relates to the evidence in this case now, but as it may relate to it on the next trial; whether conceding for the sake of the argument, that Work and Reese, who were killed by the explosion, were fellow-servants of the plaintiff, and that in violation of instructions they went into the heading with their ordinary mining lamps lighted, without taking the safety-lamp, as instructed to do, and thus ignited the gas and in consequence it exploded, killing them and injuring the plaintiff, who did not contribute to the injury, the plaintiff could recover if the jury believed from the evidence, that through the negligence of the defendants, the fire-damp or explosive gas was in the mine? Of course all these assumed facts were questions for the jury; and if we were considering this question on a motion for a new trial, if there was evidence tending to prove the negligence of the defendants, and tending to show that there was no negligence on the part of the fellow-servants, Work and Reese, the whole question of the responsibility of the defendants would have to be left to the jury. *Johnson v. Brown*, 61 Penn. St. 58; *Washington v. B. & O. R. Co.*, 17 W. Va. 190.

In *Wright v. Railroad Co.*, 25 N. Y. 562, it was decided that a master is not chargeable for injuries to one servant caused by the negligence of another, on the ground of the unskillfulness of the latter, unless the injuries resulted from such unskillfulness. In *Warner v. Railroad Co.*, 39 N. Y. 468, it was decided that the only ground of liability of the master to an employee for injuries resulting from the carelessness of a co-employee, which the law recognizes is that which arises from personal negligence or from want of proper care and prudence in the management of his affairs or in the selection of his agents or appliances, etc.

In *Booth v. Railroad Co.*, 73 N. Y. 38; s. c., 29 Am. Rep. 97, it was decided that where the negligence of the engineer of a train in running it is contributory with that of the company in not sending

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a sufficient number of brakemen, and both together cause an injury to an employee, the negligence of the engineer does not relieve the company from liability.

In *Cayzer v. Taylor*, 10 Gray, 274, it was decided that a master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow-servant contributes to the accident.

In *Crutchfield v. Railroad Co.*, 76 N. O. 320, it was decided that a master is liable for an injury to a servant resulting from the negligence of a fellow-servant, if the master contributes to the negligence.

In *McMahon v. Henning*, 1 McCrary, 516, it was decided by MCCRARY, J., that a master is liable for negligence in the use of defective machinery, whereby his servant was injured, although the negligence of a fellow-servant contributed to the injury. There is nothing contrary to this view in *Washington v. B. & O. R. Co.*, 17 W. Va. 190, or *Faucet v. Railroad Co.*, 24 W. Va. 755. In both these cases it was held that the cause of an injury in contemplation of law is that which immediately produces it as its natural consequence, and therefore if a party be guilty of an act of negligence which would naturally produce an injury to another, but before such injury results, a third person does some act, which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the injury could never have occurred but for his negligence. The casual connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which act is in law regarded as the sole cause of the injury.

In the cases which I have cited from other States, the two causes together, the negligence of the master and the negligence of the fellow-servant, caused the injury to the servant. If therefore it appears that the proprietors of a coal-mine had been negligent in permitting fire-damp to accumulate in their mine, which would not produce any injury until ignited, and if it were ignited by a fellow-servant, who went into the dangerous part of the mine with a lighted lamp contrary to the orders of the proprietor of the mine, and by such lighted lamp the fire-damp was ignited and exploded by which a servant was injured, such explosion and injury would be directly and immediately caused by the act of the fellow-servant.

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and not by the negligence of the master, and the master under these circumstances would not be responsible for such injury. We do not say that these were the facts. It may be that those who went into the mine did not take lighted lamps, and that the gas was ignited in some other way. It may be that the mine "boss" had not done his duty in exploring the mine with the safety-lamp to discover the presence of gas; and it may be that no order had been given not to enter that part of the mine without taking the safety-lamp; all these are questions for the jury as to the manner in which the explosion occurred.

It is unnecessary to consider the affidavits as to the after-discovered evidence.

For the errors pointed out the judgment is reversed with costs, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed and remanded.

SNYDER, J., dissents.

JOHNSON V. COMMERCIAL BANK.

(21 W. Va. 342.)

Negotiable instrument — maker paying forged note.

If one pays a forged note purporting to be made by him he cannot recover the amount.

ACTION to recover the amount of a note paid. The opinion states the case. The plaintiff had judgment below.

A. J. Clark, for plaintiff in error.

Caldwell & Caldwell, for defendant in error.

JOHNSON, President. On September 3, 1884, B. R. Johnson brought in the municipal court of Wheeling an action of trespass on the case in *assumpsit* against the Commercial Bank of Wheeling, to recover the amount of a note, \$225, which purported to have been signed by said B. R. Johnson, payable to the order of Philip Metzner, and negotiated by said bank, and after maturity paid by said supposed maker, who afterward discovered that his

signature thereto was a forgery. The declaration contained the common counts in *assumpsit*, no special count.

The defendant demurred to the declaration, which demurrer was overruled, and the defendant pleaded *non-assumpsit*. The case was tried before a jury and verdict was rendered for the plaintiff. The defendant moved to set aside the verdict and grant it a new trial, which motion was overruled, and judgment was entered on the verdict. The defendant took a bill of exceptions to certain rulings of the court, which bill certifies all the evidence in the case.

[Omitting the evidence, which was to the effect that Johnston paid the note without seeing it, although there was nothing to prevent his seeing it.]

Under these circumstances can the defendant, the Commercial Bank, be required by law to pay back the money so paid on said forged note?

The leading case on the subject, so regarded in all the books, is *Price v. Neal*, decided in 1762, 3 Burr. 1354. It was an action on the case brought by Price against Neal, wherein Price declares that the defendant, Neal, was indebted to him to £80 for money had and received to his, plaintiff's, use, and damages were laid at £100. It was proved at the trial that a bill was drawn as follows: "Leicester, 22d November, 1760. Sir:—Six weeks after date pay Mr. Roger Reeding, or order, £40, value received, for Mr. Thomas Ploughfor, as advised by sir, your humble servant, Benjamin Sutton. To Mr. John Price in Bushlane, Cannon street, London. Indorsed: R. Reeding, Anthony Topham, Hammond and Larocke. Received the contents, James Watson & Son; witness, Edward Neal;" that this bill was indorsed to the defendant for a valuable consideration and notice of the bill was left at the plaintiff's house on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant to pay him the said sum of £40 and take up said bill, which was done accordingly; that another bill was drawn as follows: "Leicester, 1st February, 1761. Sir:—Six weeks after date pay Mr. Roger Reeding, or order, £40, value received, for Mr. Thomas Ploughfor, as advised by sir, your humble servant, Benjamin Sutton. To Mr. John Price, in Bushlane, Cannon street, London;" that this bill was indorsed: "R. Reeding, Thomas Watson & Son. Witness for Smith, Right & Co;" that the plaintiff accepted this bill by writing on it, "accepted, John Price," and that the plaintiff wrote on the back of it: "Messrs.

Frame and Barclay, pay £40 for John Price;" that this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his banker's for payment and was paid by order of the plaintiff and taken up.

"Both those bills were forged by one Lee, who has been since hanged for the forgery. The defendant, Neal, acted innocently and *bona fide*, without the least privity or suspicion of the said forgeries or either of them, and paid the whole value of those bills. The jury found a verdict for plaintiff and assessed damages £80, and cost £40, subject to the opinion of the court on this question: 'Whether the plaintiff, under the circumstances of the case, can recover back from the defendant the money he paid on the said bills or either of them?' Mr. Stowe, for the plaintiff, argued that he ought to recover back the money in this action, as it was paid by him by mistake only, on supposition that those were true, genuine bills, and as he could never recover it of the drawer, because in fact no drawer exists, nor against the forger, because he is hanged. Mr. Yates, for the defendant, argued that the plaintiff was not entitled to recover back this money from the defendant. He denied it to be a payment by mistake and insisted that it was rather owing to the negligence of the plaintiff, who should have inquired and satisfied himself, 'whether the bill was really drawn on him by Sutton or not.' Here is no fraud in the defendant, who is stated to have acted innocently and *bona fide* without the least privity or suspicion of the forgery and to have paid the whole value of the bills. Lord MANSFIELD stopped him from going on, saying:

"This is one of those cases that can never be made plainer by argument. It is an action on the case for money had and received for the plaintiff's use, in which action the plaintiff cannot recover the money back, unless it be against conscience in the defendant to retain it; and great liberality is always allowed in this sort of action. But it can never be thought unconscientious in the defendant to retain this money, when he has once received it on a bill of exchange, rendered to him for a fair and valuable consideration, which he had *bona fide* paid without the least privity or suspicion of any forgery. Here was no fraud, no wrong. It was incumbent on the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it, but it was not incumbent on the plaintiff to inquire into it. Here was notice given

by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill he actually accepts; after which acceptance the defendant innocently and *bona fide* discounts it. The plaintiff lies by for a considerable time after he has paid these bills, and then found out they were forged, and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first, and he paid the whole value *bona fide*. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case if there was any fault or negligence in any one it certainly was in the plaintiff and not in the defendant.' "

In *Smith v. Mercer*, 6 Taunt. 76 (1 E. O. L. 312), the defendant took a bill accepted payable at the plaintiffs', who were the drawer's bankers and indorsed it to their, the defendants', agents, to whom the plaintiffs paid it when due, and seven days after sent it as their voucher to the drawee, who apprized them that the acceptance was forged. It was held by three judges, DALLAS, HEATH and GIBBS, O. J., against CHAMBER, J., that the plaintiffs could not recover from the defendants the amount which they had thus paid them on the forged acceptance. DALLAS, J., said: "And though the facts are not precisely the same, I think the case of *Price v. Neal*, 8 Burr. 1354, and 1 Bl. 390, furnishes a rule, which ought to govern the present." GIBBS, O. J., said: "A narrow and particular ground is with me conclusive in this case. If the acceptance had been genuine and the plaintiffs had refused payment, the defendants had their remedy against the supposed acceptor; or if they failed to obtain the amount from him, they had their remedy against the prior parties on the bill. The acceptance carried with it an order on the bankers of the supposed acceptor to pay the money. It purported to be an order of Evans, whose banker the plaintiffs were. It was incumbent on them to see to the reality of that order before they obeyed it, and if by obeying it they are the sufferers, they ought not to throw on another a loss occurring without fault of his. See the circumstances. The defendants present the bill for payment, and it is paid to them. The money remained

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in their hands, without demand made on them for it, from the 23d of April till the 30th of April; the forgery being then discovered the plaintiffs demand it back from the defendants. If the plaintiffs had originally refused to pay this money, the holder would immediately have given notice to the drawer and to the immediate indorser which would have been transmitted to the first indorser and drawer. In consequence of the bill being paid the defendants continued to have the money in their hands till the 30th of April. I think it was then too late for the defendants to give notice to the prior parties, and by not having given such notice they lost their remedy against those parties. * * * I have put the case on the express point that by the acts of the plaintiffs the defendants are put in a worse situation; but I do not mean thereby to express my dissent from the larger ground on which the case has been put by my brothers HEATH and DALLAS; but I think the ground on which I have put it is alone a sufficient answer to all the arguments that have been used."

CHAMBER, J., in his dissenting opinion, said: "The situation of the plaintiffs is extremely material. They are no parties to this bill, neither drawees, acceptees or payees. They are not purchasers of the bill; they never had any property in it; they are mere servants and agents of the payees; it is as to them a payment under a supposed authority which does not exist."

In *Mather v. Maidstone*, 37 Eng. L. & Eq. 339, JERVIS, C. J., said: "As the general rule the holder of a bill of exchange is entitled to know whether the acceptance is genuine and whether it will be paid by the acceptor. If the acceptor pays it, he cannot afterward recover the money back, if he has at the time he pays it the means of satisfying himself of his liability to pay it, even though it should turn out that the acceptance is a forgery. Here instead of paying money for the bill, the acceptor gave another bill, but I think that can make no difference. * * * The defendant, after the bill had come into his hands, and after he had an ample opportunity of inspecting it, kept it and gave a fresh bill at three months; and after an interval of one month he discovered that the acceptance of the original bill was a forgery, and he said that he was not liable on it, and offered to return it so as to put the plaintiff in the same condition as he was in a month before, the plaintiff having been all that period deprived of his remedy against the other parties liable on the bill. Under these circumstances the

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defendant cannot be allowed now to say the acceptance was not in his handwriting." See *Levy v. Bank of the United States*, 4 Dall. 234.

In *U. S. Bank v. Bank of Georgia*, 10 Wheat. 33, it was decided that in general a payment received on forged papers or in base coin is not good; and if there be no negligence in the party, he may recover back the consideration paid for them or sue upon his original demand; but that this principle does not apply to a payment made *bona fide* to a bank in its own notes, which are received as cash and afterward discovered to be counterfeit; that in case of such a payment on general account an action may be maintained by the party paying the notes, if there is a balance due him from the bank upon their general account. Mr. Justice STORY, in delivering the opinion of the court, affirms the decision of *Price v. Neal*, *supra*, and says: "The case of *Neal v. Price* has never since been departed from, and in all the subsequent decisions, in which it has been cited, it had the uniform support of the court and has been deemed a satisfactory authority." The court in this case also approved the decision in *Gloucester Bank v. Salem Bank*, 17 Mass. 33, and approvingly quotes the following from PARKER, C. J., in that case:

"The true rule is that the party receiving such notes must examine them as soon as he has opportunity, and return them immediately. If he does not he is negligent, and negligence will defeat his right of action. This principle will apply in all cases where forged notes have been received, but certainly with more strength, when the party receiving them is the one purporting to be bound to pay. For he knows better than any other whether they are his notes or not, and if he pays them or receives them in payment, and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own." Referring to the case from 17 Mass. and *Price v. Neal*, and other authorities by him cited, Mr. Justice STORY says: "Against the pressure of these authorities there is not a single opposing case; and we must therefore conclude that both in England and America the question has been supposed to be at rest."

In *Bank of St. Albans v. Farmers and Mechanics' Bank*, 10 Vt. 145; s. c., 33 Am. Dec. 138, the court by PHELPS, J., said: "The case of *Price v. Neal*, is now understood to have proceeded upon the ground that the drawee is bound to know the handwriting of his correspondent, and thus understood, its authority has never

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been questioned. It has often been commented on both in the English courts and those of this country, and although its applicability to a transfer of a forged security between persons not parties to it has been questioned, yet its authority as applied to the case of such a bill, accepted or paid by the drawee, has been uniformly and fully sustained. That the rule thus adopted extends as well to the case of a bill paid upon presentment, as to one accepted and afterward circulated, appears not only from the case itself but from subsequent decisions, in which the case itself has been approved and its principle adopted. There is good reason for the declaration, upon which the authority of that case rests, to be found in the intrinsic character of the transaction itself. The presentment of a bill to the drawee is a direct appeal to him to sanction or repudiate it. It is an inquiry as to its genuineness addressed to the party, who of all men is supposed to be the best able to answer it, and whose decision is most satisfactory. He is moreover the person, to whom the bill points, as the legitimate source of information to others; and if he were permitted to dishonor a bill, after once having honored it, the very foundation of confidence in commercial paper would be shaken. There is a wide difference between such a transaction and the passing of paper as a representative of money between persons equally strangers to it in the ordinary course of business. In the latter case the receiver relies in a measure upon the paper, while in the former the case is reversed, and the holder relies and has a right to rely upon the decision of him to whom the bill is addressed, and who alone is to determine whether it shall be honored or not."

In *Ellis v. Ins. and Trust Co.*, 4 Ohio St. 628; s. c., 64 Am. Dec. 610, it was held, by a majority of the court, that money paid upon a mistake of facts, and without consideration, may as a general rule be recovered back; that a well-settled exception of this rule occurs, when the payment is made by the drawee of a forged bill or check to a holder for value without fault, and the money cannot be returned without prejudice to him; that the exception rests upon the supposed acquaintance of the drawee with the drawer's signature, and the negligence imputed to him for paying the paper, without sufficient inquiry as to its genuineness; that this exception does not apply, when either by express agreement or a settled course of business between the parties, or by a general custom in the place applicable to the business, in which

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both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud and by his negligent failure to perform it has contributed to induce the payee to act upon the paper as genuine and to advance the money upon it; nor does it apply in any case, where the parties are in a mutual fault, or where the money is paid upon mistake of facts in respect to which both were bound to inquire; that in a case of money paid upon a forgery not falling within the exception, but being governed by the general rule, it is sufficient to give notice when the forgery is discovered. THURMAN, C. J., and SWAN, J., dissent from the decision. RANNEY, J., in delivering the opinion of the majority of the court, said on page 652:

“ We admit it to be equally well settled, that where the instrument is drawn upon, or purports to be signed by, the party paying the money, to a holder without fault, and whose situation would thereby be changed to his prejudice, if he were compelled to refund, the money cannot be recovered back. The foundations of the rule are sufficiently obvious. The party is supposed to know his own handwriting, in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law therefore allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and if he fails to discover the forgery, imputes to him negligence, and as between him and the innocent holder compels him to suffer the loss.”

In *Commercial and Farmers' National Bank v. First National Bank*, 30 Md. 11, the authority of *Price v. Neal* is cited and approved.

In *National Park Bank of New York v. Ninth National Bank*, 46 N. Y. 77; s. c., 7 Am. Rep. 310, the complaint stated that on March 25, 1867, the Ridgely National Bank of Springfield, Illinois, drew its draft or bill of exchange on plaintiff for the sum of \$14.20 payable to the order of Eli Shirley and delivered the same to the payee; that afterward the amount of said draft was fraudulently changed to \$6,300, and the name of the payee to E. G. Fanchon, Esq.; that the name of William Ridgely, cashier, signed to said draft was erased and afterward rewritten by the person making the erasure; that the same was then discounted by the Lexington National Bank and by it was indorsed to defendant; that afterward and on or about April 12, 1867, the defendant presented said draft

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to plaintiff, and said plaintiff paid thereon the sum of \$6,800; that plaintiff discovered the forgery May 10, 1867, and forthwith notified the defendant thereof and demanded re-payment of said sum less \$14.20, which was refused. Defendant demurred and for ground stated, that complainant did not state a cause of action. The court below overruled the demurrer. ALLEN, J., in pronouncing the unanimous opinion of the court, said on page 80:

"For more than a century it has been held and decided, without question, that it is incumbent on the drawee of a bill to be satisfied that the signature of the drawer is genuine; that he is presumed to know the handwriting of his correspondent; if he accepts or pays a bill to which the drawer's name had been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid."

He then refers to and approves *Price v. Neal*, and subsequent decisions, affirming the same doctrine, and further says:

"Cases have been distinguished from *Price v. Neal*, and its applicability to a transfer of a forged instrument, between persons not parties to it, has not been extended to forgeries of indorsements or handwriting of parties to negotiable instruments other than the drawers. But as applied to the case of a bill to which the signature of the drawer is forged, accepted or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterward paid. * * * A rule so well established and so firmly rooted and grounded in the jurisprudence of the country ought not to be overruled or disregarded. It has become a rule of right and of action among commercial and business men, and any interference with it would be mischievous. Judge RUGGLES, in *Goddard v. Merchants' Bank*, 4 N.Y. 149, well says: 'It should not be departed from or frittered away by exceptions resting on slight grounds and cannot be overruled without overthrowing valuable and well-settled principles of commercial law.'"

The judgment of the court below was reversed, and judgment entered for defendant. The opinion of RUGGLES, J., in *Goddard v. Merchants' Bank*, *supra*, referred to by Judge ALLEN, was a dissenting opinion from the majority of the court, who he evidently thought were in that case "frittering away" by an exception to the general rule, and thus overthrowing, "valuable and well-settled principles of commercial law." To the same effect is *Stout*

v. *Bennett*, 39 Mo. 277; *Young v. Lehmon*, 63 Ala. 519; *Bernheimer v. Marshall & Co.*, 2 Minn. 78; s. c., 72 Am. Dec. 79, and *Hoffman & Co. v. Bank of Milwaukee*, 12 Wall. 181. I will now refer to some cases cited by counsel for plaintiff, the defendant in error.

The case of *Goddard v. Merchants' Bank*, *supra*, was a case in which it appeared that a forged bill purporting to be drawn by a bank in Ohio was presented to the drawees in New York, and payment refused on Saturday for want of funds of the drawer. On Monday following, the plaintiff on being informed of the matter, called at the office of the notary, who had the bill for protest and notice, and left his check for the amount in order to take up the bill for the honor of the drawers. In consequence of the absence of the notary from his office he did not see the bill, but left word to have it sent to his place of business. The notary on the same day delivered the check over to the holder of the bill, but did not send the bill to the plaintiff. The plaintiff called again the next day at the office of the notary, and on being shown the bill ascertained and pronounced it to be a forgery. It was held by a majority of the court, RUGGLES, J., and JEWETT, J., dissenting, that under the circumstances the plaintiff was not chargeable with negligence, and that he was entitled to recover the money he had paid on the ground of mistake. To the same effect is *Canal Bank v. Bank of Albany*, 1 Hill, 287.

The case of *Lawrence v. American National Bank*, 54 N. Y. 432, only lays down the general rule that money paid under mistake of fact may be recovered back. That this is the general rule is nowhere doubted.

In *National Bank of Commerce v. Banking Association*, 55 N. Y. 211; s. c., 14 Am. Rep. 232, it is held that a bank is not bound to know the handwriting or genuineness of the filling up of a check drawn upon and paid by it. It is legally concluded only as to the signature of the drawer and its own certification; therefore when a bank has paid by mistake to a *bona fide* holder a certified check, which after certification had been fraudulently altered by raising the amount, it can recover back the amount thus paid, unless such holder has suffered loss in consequence of the mistake. It is also held in this case that a mistake in recognizing a forged instrument as genuine is binding only when the forgery is such that it ought to have been discovered by a bare inspection of the instrument

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without reference to any thing outside of it, not even to the memory of the party as to the obligations he had issued. This decision approves *Price v. Neal*, and the case in 46 N. Y. *supra*.

Mayer v. Mayor, etc., 63 N. Y. 455, is an ordinary case of paying money under mistake of fact.

In *First National Bank of Quincy v. Ricker*, 71 Ill. 439; s. c., 32 Am. Rep. 104, the exception to the general rule is recognized that the drawee of a check is presumed to know the signature of the drawer, and if the drawee pays a forged check to the holder he will not be entitled to recover back the money so paid, where there has been no fraud practiced upon him. But it was held that the drawee or payer of a forged bank check can recover back the amount paid by him on it, when the holder or payee is himself at fault or has been guilty of fraudulent practices, which may have thrown the drawee off his guard.

Welch v. Goodwin, 123 Mass. 71; s. c., 25 Am. Rep. 24, seems to have been decided without much consideration, and virtually overruled *Gloucester Bank v. Salem Bank*, 17 Mass. 33, without noticing it and without referring to one of the many authorities we have cited. LORD, J., said: "The question which we are called upon to decide is, whether under any circumstances a party may recover back money upon a security being a forged signature of himself, supposing it at the time of payment to be his genuine signature. We can have no doubt that he may. This is entirely clear in case he was induced to make the payment by fraud or misrepresentation. Nor is it necessary that fraud or misrepresentation should exist. An innocent mistake whether arising from natural or temporary infirmity, or otherwise made without fault on his part, entitles him to the same relief. How far this right would be affected by neglect on his part to give prompt notice of the mistake or by any change affecting the situation or the rights of the persons to whom the payment is made, we are not called upon to consider. Here notice was given immediately upon discovering the forgery. Whatever securities were given up by the defendant in consideration of the receipt of the forged note had been given up before the payment was made."

It seems to us from the review of the authorities, that it is a rule of commercial law too firmly established to be shaken, being sustained by an unbroken line of authorities for more than a century, that the drawee of a bill of exchange is presumed to know the hand-

writing of the drawer, and *a fortiori* the maker of a negotiable note is presumed to know his own signature, and if the drawee accepts or pays the bill, or the maker pays the negotiable note in the hands of a *bona fide* holder, to which the drawer's or maker's name has been forged, he is bound by the act and cannot recover back the money so paid. It is essential to the business interests of the country that there shall be certainty in commercial transactions; that the mercantile law shall be firm and stable, never varying, so that those who deal in commercial paper may know what their rights are. Of course a drawee or maker of commercial paper may by the exercise of due care protect himself against losses by forgery, and if he pays such paper, the law imputes to him negligence in so doing, and he cannot after such payment throw the loss upon the holder of such paper. But it is said the holder of such paper should not be permitted to hold the money so paid, unless he has been placed in a worse situation thereby and has suffered actual loss; under such circumstances the law presumes he has been placed in a worse situation and would be injured if he had to pay the money back. The law presumes a loss, and it need not be proved. Mr. Justice STORY says, in *United States Bank v. Bank of Georgia*, 10 Wheat. 356:

"It is sufficient for us to declare that we place our judgment in the present case upon the ground, that the defendants were bound to know their own notes and having received them without objection they cannot now recall their assent. We think this doctrine founded on public policy and convenience; and that actual loss is not necessary to be proved, for potential loss may exist, and the law will always presume a possible loss in cases of this nature."

But it is said that Johnston did not see the note before he paid it. So much greater was the negligence the law imputes to him. He had every opportunity to see the note. ATWATER, J., in delivering the opinion of the court in 2 Minn. 84, says: "If the drawee is allowed to recover on payment of a forged draft, because he has not seen it, he would probably never care to see a draft before payment, but even when presented at his counter and he present, would direct his clerk to pay it, and afterward take advantage of his own laches to enforce a recovery. To admit this would be to overthrow the long-settled principles of law and require the holder, instead of the drawee, to guarantee the signature of the drawer, which manifestly would be most unjust and inequitable and destructive of commercial business."

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It is unnecessary to pursue this discussion further. Johnston was clearly guilty of negligence in paying the note, and he cannot throw the loss on the Commercial Bank, which was without fault in the premises. He not only did not examine the note before he paid it, but did not examine it for several days afterward, and did not seem to be certain it was a forgery until he had examined the books of the Riverside Furniture Company. This was on the ninth day of April, seven days after he had paid the note.

[Omitting a minor consideration.]

The judgment of the Municipal Court of Wheeling is reversed, the verdict of the jury set aside, and the case is remanded for a new trial.

Reversed and remanded.

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(21 W. Va. 644.)

Pensions — exemption.

Where a pensioner receives pension drafts from the government, and transfers them or their proceeds to another upon his agreement to convey land to the pensioner's wife, and the land is so conveyed, *held*, that it is not subject to the lien of judgments against the pensioner existing at the time the drafts were received by him.

SUIT to subject land to the lien of judgments. The opinion states the case. The bill was dismissed below.

D. F. Pugh and T. J. Hugus, for appellants.

Dave D. Johnson, for appellee.

SNYDER, J. Suit in equity brought in October, 1882, in the Circuit Court of Tyler county by Levi Hissem and others against D. D. Johnson and M. M. Johnson, his wife, and others. The plaintiffs are judgment creditors of the defendant D. D. Johnson, and the object of the suit is to subject a tract of about seventy-one acres of land in said county to the payment of the plaintiff's judgments. The said land was owned by Abraham Johnson at the time said judgments were recovered and the legal title thereof is

still held by him. By written contract dated September 14, 1880, the said Abraham Johnson, in consideration of \$4,200, of which \$3,500 was paid at said date and the residue to be paid in installments at one, two and three years thereafter, sold the said land to the defendant, M. M. Johnson, and bound himself to convey the same to her by deed retaining therein a lien for the deferred payments. The deferred payments, except about \$200, were afterward paid.

The plaintiffs allege in their bill, that all the purchase-money for said land was paid out of moneys belonging to the defendant D. D. Johnson, and that the agreement for the conveyance of the land by the said Abraham to the said M. M. Johnson was arranged and procured by the said D. D. Johnson with intent to delay, hinder and defraud his creditors, especially the plaintiffs, and the same is therefore void.

The defendants, D. D. and M. M. Johnson, by their joint answer, admit the existence of the plaintiffs' judgments, but deny they operate as liens upon said land. In reference to the purchase and payment of said land they aver, that the said D. D. Johnson, by reason of wounds received while a soldier in the service of the United States government during the late war, was awarded a pension by said government; that in July, 1880, he received on account of said pension, including arrearages, the sum of \$4,000, of which he gave to his wife, the defendant M. M. Johnson, \$3,500 to be invested by her in a house for herself and children; that accordingly she with his consent did enter into the contract of September 14, 1880, with said Abraham Johnson for the purchase of said seventy-one acres of land; that at the time of said purchase she paid to said Abraham out of said pension money \$3,500 and executed to him her three notes for the deferred payments as provided for in said contract, which notes, except about \$200, she has since paid by pension checks received by said D. D. Johnson from time to time, and which he gave to her for the purpose of paying said notes. They aver that "not one cent has been paid on said land except the identical money or checks, which respondent, D. D. Johnson, received as his said pension money." * * * "And said respondent having given said money to his wife, and it having been invested by her, and the said pension-money paid over to her into said farm by her and for her use, and not absorbed by or combined with any other money whatever, but the said farm being the

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representative now of said pension money, and no other money whatever, is free and exempt under the law and cannot be held subject to said judgments or any other debts of the said D. D. Johnson."

There is a general replication to said answer. The plaintiffs proved by the said Abraham Johnson, that the contract for the purchase of the land was made with himself and Dan and his wife, Dan acting as the agent for his wife.

[Omitting evidence.]

The cause was heard August 28, 1884, and the court being of opinion that the land "was purchased by the defendant M. M. Johnson, with the proceeds of pension checks received by the defendant D. D. Johnson from the United States" and transferred by him to the said M. M. Johnson, and that said pension and checks are, by the laws of the United States, exempt from legal process to subject the same to the payment of the debts of the said pensioner, entered a decree of said date dismissing the plaintiff's bill, and from said decree the plaintiffs obtained this appeal.

The only question to be determined here is, whether or not the appellee M. M. Johnson is entitled to hold the said seventy-one acres of land free from the judgments of the plaintiffs recovered against the said D. D. Johnson. And the solution of this question depends upon the true construction of section 4747 of the United States Revised Statutes as applied to the facts in this cause. The said statute is as follows:

"No sum of money due, or to become to any pensioner, shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The appellants contend that the sole purpose and policy of this statute is to protect pension money from being taken or seized by any process whatever, either while in the custody of the pension office, its officers or agents, or while in transit from them to the pensioner; and that to entitle the money to this protection it must be pension money either "due" or to "become due" from the United States. In support of this position the appellants rely upon the following decisions: *Cranz v. White*, 27 Kans. 319; s. c., 41 Am. Rep. 408; *Webb v. Holt*, 57 Iowa, 712; *Kellogg v. Waite*, 12 Allen, 529; and *Jardain v. Fairton, et al.*, 44 N. J. L. 376.

In *Orans v. White, supra*, the question decided was, that "where a pensioner receives pension drafts and sells the same to a bank in the usual course of business, which bank buys the drafts and credits the general account of the pensioner with the amount thereof, and from time to time thereafter a large portion of such account is checked out, *held*, that the balance due on such general account is subject to garnishment."

In *Webb v. Holt, supra*, it was decided, that where a pensioner received a pension draft on account of a pension due him and deposited said draft in a bank to his credit, the money was not exempt, in the hands of the bank, from the process of attachment for the pensioner's debts.

The court held in *Kellogg v. Waite, supra*, that the money was not exempt, because it had come to the hands of the agent of the pensioner before the act of Congress was passed, and that therefore the statute had no effect in that case.

The *syllabus* in *Jardain v. Fairton, etc., supra*, is as follows: "Money due for pensions, while it remains in the hands of the disbursing officer or agent for distribution, or while in course of transmission to the pensioner, is not liable to be seized by creditors under any legal process. After it has come to his hands it is so liable, like any other funds of the debtor."

Such is the substance of the claim and authorities relied on by the appellants. On the other hand, the appellees insist that the statute must be construed liberally in favor of the pensioner, and that so construed, according to its plain intent and policy, the pensioner may give the pension checks or the proceeds thereof to his wife without fraud upon the rights of his creditors; and that pension money in the hands of the pensioner, or invested for his use and benefit, so long as the identity of the fund is maintained, is exempt from seizure under legal process for the payment of the pensioner's debts. To sustain this position they cite *Hayward v. Clark*, 50 Vt. 612; *Folschow v. Werner*, 51 Wis. 85; and *Eckert v. McKee*, 9 Bush, 355.

The decision of the court in *Hayward v. Clark, supra*, is stated in the *syllabus* as follows: "A pensioner of the United States received a draft on account of his pension from a United States pension agent, and gave the same to his wife, who by his advice passed it to P., who gave her his note therefor payable to her order, understanding that it was for defendant's pension, and that

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defendant and his wife wanted it used for the benefit of defendant's family, or to pay for a homestead if they purchased one. *Held*, that the legal title to the draft passed to the wife by gift, and that P. was not chargeable as trustee of the defendant. *Semble*, that as the money was to be kept as a fund or invested for use as current circumstances might require, it was exempt from attachment by trustee or other process, under section 4747, United States Revised Statutes."

In *Folschow v. Werner*, *supra*, the court *held*: "Under section 4747, Revised Statutes of the United States, the money received by a pensioner of the United States in payment of his pension, and remaining in his possession, cannot be seized on process against him for debt."

Eckert v. McKee, *supra*, decides that, 1. Pension money received from the United States is not liable to attachment, levy or seizure by or under any legal or equitable process whatever. 2. Pension money cannot be subjected to the payment of the debts of the pensioner."

It is claimed that this last mentioned decision has been overruled by a decision of the Court of Appeals of Kentucky, made in 1883, in which that court held that "pension money is not exempt from seizure for the pensioner's debts after it has come into his hands." *Moxley v. Andrews*, 82 Ky., not yet published. As I have not the report of this case, it is impossible for me to determine to what extent, if at all, it is in conflict with *Eckert v. McKee*, *supra*; but apparently, it does qualify, if it does not overrule the second of the propositions above quoted from that case. In other respects I think the two cases may be reconcilable.

In *Spellman v. Aldrick*, 126 Mass. 113, the court decided that when a husband received a pension check which was indorsed by him and handed to a third person, who with the consent of the pensioner and his wife, deposited it in a bank to the credit of the wife, the proceeds of the check so deposited were liable to attachment by the husband's creditors. This decision is based upon the statutes of Massachusetts, which forbid a married woman from acquiring property by gift from her husband. The proceeds of the check was treated as the money of the husband, and as such liable for his debts.

This brief review of the decisions shows that they are about equally divided, and in irreconcilable conflict in many respects

though not in all. It seems that all the cases agree that the pension money is exempt from any legal or equitable process whatever, until it is actually paid to and received by the pensioner. That although he may have received and have in his possession the pension draft or check, such draft or check in his hands cannot be reached by any legal process. But when the pensioner has actually realized or collected the money on the check or draft, and has it in his possession or to his credit in bank, whether it is then exempt from legal process is where the conflict in the cases begins, some holding that it is not then exempt, and others holding not only that it is still exempt, but that it remains exempt even after it has been invested for the use of the pensioner, so long as the investment can be identified as its proceeds.

This is a Federal statute of which the Federal Supreme Court is in a proper case the ultimate expounder, but it seems that it has never been construed by that or any other Federal court, and as the State decisions are so conflicting and unsatisfactory, we are left free to interpret and apply said statute according to our own views of its purposes and policy.

I think the fair and reasonable conclusion from the proofs in the case before us would justify us in finding that the land in controversy was paid for with pension drafts or government checks issued to D. D. Johnson on account of a pension due him and passed by him to his wife, or more probably passed directly to the vendor, Abraham Johnson, with the understanding and agreement reduced to writing at the time, that the land should be conveyed to the wife as her separate estate. The vendor testifies positively that the deferred payments were all made with government checks. And while in his first answer as to the cash payment, he says it was paid in a check on a bank, yet in subsequent answers he says he cannot tell exactly how his payment was made, "but my impression is that it was a government check;" afterward he adds, "I think it was all paid in government checks." The witness was introduced by the plaintiffs, and these answers were given to questions propounded by them. This testimony then must be construed, at least, as favorably to the defendants as the plaintiffs, and being so construed, it seems to me that we may reasonably conclude from it that all the purchase-money was paid for in pension drafts or checks. If this interpretation of the transaction is admissible, then all the cases are agreed that the consideration paid for the land was exempt

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from legal or equitable process for the debts of D. D. Johnson. Until the pension check is paid and the money therefor is actually paid to and received by the pensioner, the money is still due to him from the government, and is by the express terms of the statute exempted from such process.

But suppose this is not the true view of the facts of this case, and that according to the pleadings and proofs, the land was not paid for with pension drafts, but was paid for with the identical proceeds derived from said drafts. So regarding the facts, the case still does not come in conflict with the actual questions decided in any of the cases before referred to, though it does come in conflict with the *dicta* and principles discussed in several of them. Taking the cases which hold that after the pensioner has actually received the money for his pension drafts, the money is liable for his debts, it will be found that all of them without exception were cases in which at the time the process issued the money was still in the hands or under the control of the pensioner, and in none of them had he disposed of, by gift or otherwise, the money sought to be subjected to legal process by his creditors. In the case before us, the money had been disposed of and actually passed from the possession of the pensioner long before this suit was instituted. It had passed into the hands of Abraham Johnson beyond the reach of any legal process whatever by the creditors of the pensioner. It is not attempted to be reached by this suit, but the only effort is to subject the land in the hands of a third party, the wife of the pensioner, upon the sole ground that the pension money so disposed of was the consideration paid for the land. It is therefore a very different case from any of those relied on by counsel for appellants.

Let us now revert to the statute itself and endeavor to ascertain its purpose and policy in reference to the particular facts of this case, as we have just conceded them to be. Its first provision is, "no sum of money due, or to become due to any pensioner, shall be liable * * * under any legal or equitable process whatever." The exemption here declared is absolute and unqualified. The next provision is, "whether the same remains with the pension office' * * * or in course of transmission to the pensioner." This is not necessarily a qualification of the absolute exemption declared in the preceding provision. If it had been so intended the word "while" would have been used instead of "whether." The latter is not a word of limitation, but the former is necessarily

such. If the language were, "no sum of money shall be liable while it remains in the pension office," etc., there could be no question that the exemption was intended to be confined to the time and place specified, that is, during the time it is in the hands of the pension officers or in course of transmission to the pensioner. But the word "whether" gives the specifying provision a very different import. It entirely excludes the implication that the enumeration of particular times and places of exemption was intended to exclude all others. This is made more manifest by the concluding provision, "but shall inure wholly to the benefit of such pensioner." If the preceding provisions are construed to limit the exemption to the places enumerated, then this provision is wholly useless and ineffectual for any purpose. Moreover, if the statute had no other purpose than to exempt the pension money while in the hands of the officers and agents of the government or in transmission from them to the pensioner, no such statute was needed; because by the general law the money was protected from legal process or interference by creditors in any manner while in the custody of the government or any of its officers or agents appointed for its distribution, or while it is in course of transmission from them to the pensioner or person entitled to receive it. *Buchanan v. Alexander*, 4 How. 20; *Elwyn's Appeal*, 67 Penn. St. 367.

It seems to me therefore that the exemption was not intended to be rigidly confined to the times and places enumerated in the statute. It provides not only that the money shall not be seized by legal process before it is received by the pensioner, but it likewise expressly declares that it "shall inure wholly to the benefit of the pensioner."

The next inquiry is, how shall it inure to the benefit of the pensioner? I do not think this statute was intended to exempt pension-money, after it has been received by the pensioner, entirely from liability for his debts. In other words, I do not think it was intended to add to the exemption laws of the States by exempting the proceeds of pensions from liability for the debts of the pensioner, even if Congress had the right to create such an exemption, which I very much doubt. But as pensions are mere bounties, which the government has the right to grant or withhold, as its will or policy may dictate, it has the undoubted right to grant them in such manner and upon such conditions, not inconsistent with the laws and policy in the States in which the pensioners reside, as Congress

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in its judgment and discretion may deem proper to impose. It may give the pensioner the absolute right to dispose of the bounty by gift or otherwise to whom he chooses, and without regard to any debts he may owe or the claims of his creditors. The money being a bounty and not a debt due to the pensioner, his creditors have no legal rights in regard to it. He can dispose of it either with or without consideration, and such disposition cannot be regarded as a fraud upon his creditors or any violation of their rights; because they have no legal right or claim to it, at least, until they have acquired such legal right or claim by some process of the State law, to subject it to the satisfaction of their debts, not in contravention of the act of Congress granting the bounty. If such process is not resorted to and such right acquired before the pensioner has disposed of the pension or its proceeds, the right to do so is lost, and the person to whom the same has passed acquires a valid title thereto, unaffected by the claims of the creditors of the pensioner. The money is no longer subject to the debts of the pensioner, because it has rightfully passed from his hands by the power given to him over it by the government, his benefactor. Nor is it liable in the hands of the person to whom it has been passed or transferred, because such person has acquired a valid title to it exempt from any legal rights of the creditors of the pensioner. The money is of course liable to be subjected to the payment of the debts of the donee or transferee, but it is not also liable for the debts of the donor or transferrer. If therefore the creditors of the donee or transferee do not complain, those of the donor or transferrer cannot do so, and the donee may do with it as he pleases. He may give it to the wife of the donor or convey to her its equivalent in land. If he does the latter, the land will be the separate property of the wife, liable as her other property for her debts, but it will not be liable for the debts of her husband. It will be her separate property with the same exemptions, incidents and liabilities of any other separate estate she may have, and no other. *Hayward v. Clark*, 50 Vt. 613; *Child v. Pearl*, 43 Vt. 224.

This conclusion is supported by many other provisions of the pension law by which the benefits of pensions are carefully guarded for the use of the pensioner and his family, but I deem it unnecessary here to do more than to cite some of said provisions. See §§ 4745, 4766, 4785, 4786 and 4703 U. S. Rev. Stats.

In the case at bar, the appellee D. D. Johnson, having obtained

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the pension drafts and either transferred them, or the proceeds derived from them, to Abraham Johnson, who in consideration thereof by written contract agreed to convey to the appellee M. M. Johnson, the wife of said D. D. Johnson, the land sought to be subjected to the plaintiff's judgment in this suit, according to the views hereinbefore expressed, the said land is not liable for the payment of the plaintiffs' debts, and therefore the decree of the Circuit Court must be affirmed.

Judgment affirmed.

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(27 W. Va. 681.)

Municipal corporation — fire limits.

Under a power "to make regulations for guarding against damage by fire," a city may establish fire-limits and forbid the erection of wooden buildings within them.*

THE opinion states the case.

Kenna & Chilton, for plaintiff in error.

W. A. Quarrier, for defendant in error.

JOHNSON, President. Mrs. Theresa Reed was having constructed in the city of Charleston, in the interior of the square bounded by Kanawha street, Capitol street, Virginia street and Summers street, on her lot, which fronts on Virginia street, a building constructed in the following manner: It is two stories high, made of wooden studding, with a sheeting roof. All the sides of said building are to be covered with sheet iron. It is to be lined inside with sheet iron. The roof is to be covered with sheet iron. The bottom floor is dirt and to be filled up to cover the sills. The upper is to be constructed of wood over-laid and underlaid with sheet iron. The entire building, both inside and outside, is to be covered with sheet iron, and the building is to have no windows. At the time the facts were agreed, and from that agreement this statement is made, the building was so far con-

* See *King v. Desmout* (98 Ill. 305), 88 Am. Rep. 69.

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structed that the entire wooden frame was finished, and the wooden portion of the roof, the sheeting, was completed. The building is eighty feet long, thirty-five feet wide, and twenty-one feet high. On the square, where it is being constructed, the Kanawha street front is entirely covered with buildings. Capitol street front is entirely covered with buildings; Summers street front is almost covered with buildings, all of which are constructed in accordance with the fire-ordinance of the city. The rear of all these buildings in the square closely approach the Reed building, the nearest being that of J. C. Arnold, which is four feet six inches therefrom. The rest of the buildings in said square vary from sixteen to sixty feet distance therefrom. All the buildings on the square are occupied by wholesale and retail merchants. A plot of the square is filed with the agreement of facts and shows the position of each of said buildings relative to the Reed building.

On Saturday the 22d August, 1885, the defendant, Reed, was notified to stop the construction of the building, which she refused to do; and when the trial commenced, a large number of hands were at work on the building. She claimed a permit from the city council to construct the building. Her petition to council was as follows:

“Your petitioner, Mrs. Theresa Reed, respectfully prays, that she be allowed to build a warehouse on her lot on Virginia street in said city eighty feet long by thirty-five feet wide in accordance with the fire-ordinance and the amendments thereto.

“THERESA REED.

“*By Counsel.*”

The prayer of the petitioner was granted by a vote of four to three. There was no other permit granted to her. The ordinance of the city as to protection against fire, which was in the agreement of facts, is as follows:

“Ordinance of October 31, 1879, amending and re-enacting an ordinance entitled: ‘An ordinance defining the city fire-limits.’

“Be it ordained by the common council of the city of Charleston.

“Section 1. That the ordinance, entitled ‘An ordinance defining the city fire-limits,’ be and the same is hereby amended and re-enacted so as to read as follows: From and after the adoption of this ordinance, no new building, or extension of old ones, shall be erected within the limits hereinafter described, except they be built

of either brick, stone, iron or concrete, with fire-proof roof. The limits above referred to shall be known as the fire limits." * * * Then follows the boundary including the Reed building.

"Section 2. In all cases where provisions of this ordinance are being violated, the mayor shall have the power to stop the work of building or extending until the matter can be brought before the common council.

"Section 3. Any person violating the provisions of this ordinance shall, upon conviction thereof, be fined in a sum not exceeding \$100.

"Section 4. (Repeals all ordinances in conflict with this.)"

The ordinance of August 3, 1883, is entitled, "An ordinance defining more strictly the fire-ordinance," and is as follows:

"Be it ordained by the common council of the city of Charleston, that the fire ordinance shall be so construed and understood as to prohibit the erection within the fire-limits of the city of any wooden houses covered with tin or iron."

The last ordinance is dated October 26, 1883, and is as follows: "An ordinance prescribing the conditions upon which outbuildings, other than coal houses and privies, may be erected within the city fire-limits:

"Be it ordained by the common council of the city of Charleston, that hereafter it shall be lawful to erect within the city fire-limits after first obtaining a permit therefor, outbuildings other than coal houses and privies not exceeding 10x15 feet in outer dimensions, provided the same be covered by tin or sheet iron nailed on studding, and provided further that the same be built not closer to the adjacent street or premises than ten feet, unless in the latter case the owner of said adjacent premises consent that the distance herein prescribed may be less."

The agreement of facts embraced also the following, that there was given in evidence a plat and certificate made by the city engineer in regard to the character, material and structure securing buildings in fire-limits of said city. * * * Also there was read in evidence the permits of the city mayor and council, under which the buildings mentioned in said plat and certificate were constructed, which permits were as follows: * * * No permits except that to the defendant, Theresa Reed, accompany the certificate of the facts agreed. There appears a paper from the city engineer, which is by agreement of the parties made a part of the records in which he shows the manner of the construction of a

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number of houses within the fire-limits of the city of Charleston, by which it appears, that in the Reed warehouse the underside of the second floor and the underside of the roof will be covered with sheet iron of the same weight and thickness as the sides, inside and out, and the roof; thickness of iron about three sixty-fourths of an inch, No. 27 stove pipe iron, same as employed in other warehouses.

[Omitting description of other houses.]

It also appears that the frame-work of the Reed building is about the usual size; and that in proportion to the size of the building no more lumber is used than in the erection of buildings of this class.

A number of interested parties on August 14, 1885, made complaint before the recorder of the city of Charleston, that Theresa Reed was then erecting a building in the interior of the square, bounded by Kanawha, Capitol, Virginia and Summers streets, within the fire-limits of the city of Charleston, of a size, in a manner and of material prohibited by the ordinance of said city, and prayed that she might be apprehended and held to answer the complaint and dealt with in relation thereto, as the ordinances of said city may require. The complaint is signed by four citizens and sworn to by one of them. On the same day the recorder issued a summons to Theresa Reed to appear before him and answer said complaint. On August 26, 1885, the complaint was heard; and the evidence being heard, the recorder imposed a fine on the defendant of \$75, and ordered the city sergeant and the policemen of the city "to stop the work of building the house described in said complaint, until the matter can be brought before the council." Theresa Reed then moved the recorder to set aside his judgment and grant her a new trial, which motion was overruled.

On October 12, 1885, Theresa Reed presented her petition to the Circuit Court of Kanawha county, praying said court to issue a *certiorari* to bring up the record and proceedings in said case before the said recorder of the city of Charleston, which writ was awarded; and thereupon the city of Charleston by its attorney appeared at once to said writ waiving service, and by consent said matter was submitted for trial; and the court having seen and inspected the record, and having heard the argument of counsel decided, that said judgments of the recorder were plainly right, and dismissed the said writ with costs.

To this judgment Theresa Reed obtained a writ of error and *superseas*.

It is argued by counsel for plaintiffs in error, that the several fire ordinances of Charleston are void, because there was no authority in the charter of the city to pass any such ordinances; that the real test of all ordinances passed by an incorporated body is the intention of the legislature in granting the charter; that corporations cannot make ordinances contrary to their charters. If there is no authority in the charter of the city of Charleston to pass the said ordinances, of course according to the great weight of authority they are void. *Ruggles v. Collier*, 43 Mo. 353; *Cook County v. McCrea*, 93 Ill. 236; *Somerville v. Dickerman*, 127 Masa. 272; *Bryan v. Page*, 51 Tex. 532; *Allen v. Galveston*, 51 Tex. 302; *Dore v. Milwaukee*, 42 Wis. 108; *Butler v. Nevin*, 88 Ill. 575; *Vance v. Little Rock*, 30 Ark. 435; *New London v. Brainard*, 22 Conn. 552; *Christie v. Malden*, 23 W. Va. 667.

Our court in the last named case has correctly settled the powers of municipal corporations in this State, as follows: "A municipal corporation possesses and can exercise the following powers and no others: 1st, those granted in express words by its charter, or the general statutes under which it is incorporated; 2d, those necessarily or fairly implied in or incident to the powers thus expressly granted; and 3d, those essential to the declared purposes of the corporation, not simply convenient, but indispensable."

In 1 Dill. Mun. Corp. 400, § 405, it is said, that municipal corporations, generally, with power to provide for the safety of their inhabitants, may prohibit the throwing of heavy or dangerous articles from the upper stories of the buildings into the streets or open spaces near them, where persons are in the habit of passing, and may, where this is consistent with the general and special legislation applicable to the municipality, establish fire-limits and prevent the erection therein of wooden buildings. For this proposition are cited *City Council v. Elford*, 1 McMull. L. 234; *Brady v. Ins. Co.*, 11 Mich. 425; *Douglass v. Commonwealth*, 2 Rawle, 262; *Wadleigh v. Gilman*, 12 Me. 403; s. c., 28 Am. Dec. 188; *Vanderbilt v. Adams*, 7 Cow. 349-352, per WOODWORTH, J.

In *City Council v. Elford* nothing more is decided than a construction of a city ordinance, the court holding that to throw bales of cotton from the upper story of a cotton warehouse is a violation of the ordinance.

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In *Bradley v. Ins. Co.* it was held that the common council of Detroit had power to pass ordinances establishing fire-limits and forbidding the re-building or repair of wooden buildings within such limits. The majority of the court by MARTIN, Chief Justice, said: "Of the power of the common council to pass the ordinances in question we have no doubt. They contravene no provision of the Constitution as we read it, and they were made in the exercise of a police-power necessary to the safety of the city. A regulation of the use of property, or a prohibition of its repair when partially destroyed, cannot to my mind be regarded as a condemnation to public use." The charter allowed the city to prevent the "location or construction" of wooden buildings, the "removing" of such buildings, and the "re-building or repairing" of the same within the fire-limits, which may be adopted.

In *Douglass v. Commonwealth* it was held that to elevate and enlarge a wooden building, so as materially to alter its character, is an offense within the meaning of the ordinance "to prevent the erection of wooden buildings within certain limits of the city of Philadelphia." It is not stated what the provision of the charter was, under which the ordinance was passed. It is presumed that the charter authorized the ordinance.

In *Wadleigh v. Gilman* it appeared, that the act incorporating the city of Bangor conferred authority on the city, "to ordain and establish such acts, laws and regulations, not inconsistent with the Constitution and laws of the State, as shall be needful to the good order of such body politic." It was held that an ordinance of the city government prohibiting the erection of wooden buildings in the city within certain limits was within the authority conferred. WESTON, C. J., in delivering the opinion of the court, said: "The regulation in question is for the general benefit. It adds to the value of the property by lessening the hazard from fire, which operates as a tax upon it, whether the owner is his own insurer or procures others to take the risk for a valuable consideration. And economy as well as safety is really consulted by building with durable materials. Nor is there any danger that the power to pass ordinances of this character will be wantonly or unnecessarily exercised. The city authorities are annually elected by the citizens from among themselves. No law of theirs, not acceptable to the majority would be tolerated or suffered to remain."

The charter of New Haven authorized the city to make ordi-

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nances "to protect said city from fire; to organize, maintain and regulate a fire department and fire-apparatus; to regulate the mode of building and the materials used for building, or altering buildings within the city or any part thereof; and the mode of using any buildings therein, and of heating the same, when such regulations seem expedient for the purpose of protecting said city from the dangers of fire," etc. It was held that an ordinance passed under said charter "establishing a fire district and forbidding the erection or placing of any wooden building within the district without license given by the board of aldermen, declaring such building should be deemed a common nuisance, and making it the duty of certain officers after reasonable notice to abate it," was fully authorized by the charter and was reasonable. *Hine v. City of New Haven*, 40 Conn. 478.

The original charter of the city of Keokuk provided: "The city counsel shall have power, and it is hereby made their duty to make and publish from time to time all such ordinances, as shall be necessary to secure said city and the inhabitants thereof against injuries by fire, thieves, robbers, burglars and all other persons violating the public peace." Section 21 of the amended charter provided: "The city council, for the purpose of guarding against the calamities of fire, shall have power to prescribe the limits within which wooden buildings shall not be erected, or placed, or repaired, without the permission of the said council, and to direct that all, or any building within the limit prescribed, shall be made or constructed of fire-proof materials," etc. It was held that the general power conferred by the original charter was limited by the amendment, and that the city had no authority to pass an ordinance for the protection against fires not authorized thereby. *City of Keokuk v. Scroggs*, 39 Iowa, 447.

The charter of the town of Greenville, Mississippi, gave the council power "to provide for the prevention and extinguishment of fires, and to organize and establish fire companies," etc.; and it was held, that while the charter did not in express terms give the council power to establish "fire-limits," and prohibit the erection of wooden buildings therein, yet such power is by the charter by fair implication conferred on the council. *Alexander v. Town Council*, 54 Miss. 659.

In *Mayor, etc., v. Hoffman*, 29 La. Ann. 651; s. c., 29 Am. Dec. 345, it was held, that the power to forbid the erection and compel

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the removal of buildings formed of combustible materials, within the densely built parts of a town, inheres in municipal corporations, and hence does not depend upon any legislative grant.

Now opposed to this construction of the charter of cities, as to the power to prevent the erection of wooden buildings, two cases are cited and relied on by counsel for plaintiff in error; *Mayor of Hudson v. Thorne*, 7 Paige, 261, and *Rye v. Peterson*, 45 Tex. 312; s. c., 23 Am. Rep. 608.

In *Hudson v. Thorne*, it appeared that the charter of the city authorized the council, from time to time, to pass such ordinances as they shall think proper to remove or prevent the construction of any fire-place, hearth, chimney, stove, oven, boiler, kettle, or apparatus used in any house, building, manufactory or business which might be dangerous in causing or promoting fires; to regulate or prevent the carrying on of manufactories dangerous in causing or promoting fires; to adopt and establish such regulations for the prevention or suppression of fires as might be necessary, etc. The ordinance declared: "No person shall erect or construct or cause to be erected and constructed, any wooden or frame barn, stable or hog-pens, within the certain specified limits of the city of Hudson of more than thirty feet in width and thirty feet in depth, without the permission of the common council," etc. The chancellor said: "I am satisfied, that under the provisions of this charter the legislature never intended to give to the common council the power to restrict the erection of wooden or frame buildings within the city, or to limit the size of buildings which individuals should be permitted to erect on their own premises."

In *Rye v. Peterson*, 45 Tex. 312, the charter of Navasota authorized the council to "ordain and establish such act, laws, regulations and ordinances not inconsistent with the Constitution or laws of this State, as shall be needful for the government, interests, welfare and good order of said body politic." The ordinance of the city "established 'fire-limits,' declaring wooden buildings thereafter erected within these limits to be nuisances, and providing for the removal of such buildings and the punishment of the parties erecting them." The cause was an injunction against the enforcement of the ordinance, and the inferior court perpetuated the injunction, which decree on appeal was affirmed. GOULD, J., for the whole court, said: "The erection and occupation of such buildings is an ordinary exercise of the property rights of the owner of

the lands, and is far from falling within the legal definition of a nuisance at common law. The power to prohibit such buildings in certain localities is statutory, and is a limitation on the ordinary rights of property. Whilst the legislative power to authorize such prohibitions is now conceded, the nature of the power is so high and the subjects themselves so far various, that it seems not naturally embraced in the subordinate power to declare and abate nuisances. To so construe it would be to extend the grant of power to a subject not we think within the intention of the law-makers in the clause cited. * * * The general disposition of the courts of this country has been to confine municipalities within the limits that a strict construction of the grants of power in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private corporations. The reasonable presumption is that the State has granted in clear and unmistakable terms all it has designed to grant. Cooley Const. Lim. 195. This presumption applies with undiminished force, where the power sought to be implied is one to limit those rights of property which are secured to every citizen under the general laws of the State. Potter Dwaris, 146. To infer the power to establish fire-limits, from the general terms used in this charter, would be to disregard the rules of construction just cited, and would go far in the direction of the opposite proposition, that specific grants of power are unnecessary. If this general clause includes the power claimed, it would seem difficult to place limits on its meaning."

Here we have the two extreme views, one in the Louisiana case, where it was held that the power to establish fire-limits and prohibit the erection of wooden buildings therein inheres in every municipal corporation independent of the specific power granted in the charter, and the other in the Maine case, where it was held that the power was fairly implied from the language of the charter authorizing the council "to ordain and establish such acts, laws and regulations not inconsistent with the Constitution and laws of this State, as shall be needful to the good order of said body politic." In *Rye v. Peterson* no express authority was given in the charter, nor was there authority by implication to prevent the erection of wooden buildings.

Now what are the powers conferred by the charter of the city of Charleston upon its council? The charter of the city was amended and re-enacted by the legislature of 1875, acts 1875, p. 517. The

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following among other powers by said charter are conferred upon the city council:

“To control the construction and repairs of all houses.

“To provide for the regular building of houses or other structures, and determine the distance they shall be built from any street or alley.

“To prevent injury or annoyance to the public or individuals from any thing dangerous.

“To make regulations for guarding against danger or damages from fires.

“To promote the general welfare of the city and to protect the persons and property of the citizens therein.”

No authority has been cited that would deny to the council the power, exercised in this instance, under a charter, which authorized it “to adopt and establish such regulations for the prevention or suppression of fires as might be necessary,” or under a charter conferring as large power for the “prevention of fires,” as the charter of the city of Charleston, unless it be *Hudson v. Thorne*, 7 Paige, 261. But here larger powers are granted than to the city of Hudson. In addition to the clause, “to make regulations for guarding against danger or damages from fire,” we have the power “to control the construction and repairs of all houses.” Now it seems to me, that the provision of the charter of Charleston is the equivalent of conferring upon the council the power, “to from time to time establish ‘fire-limits’ and prevent the erection of wooden buildings therein.” These powers, it seems to me, if not expressly granted, are fairly implied from the language used in the charter, and are incident to the powers expressly granted, and are moreover essential to the declared purposes of the corporation, not simply convenient but indispensable. It is true that the ordinances of a city government must be reasonable. *Moundsville v. Fountain*, 27 W. Va. 182, and *Jelly v. Dils*, 27 W. Va. 267. But the ordinances here, so far as they prevent the erection of wooden buildings within the “fire-limits,” are reasonable. They are essential to the safety of property within the city. No man would want to invest his money in a populous part of the city, with the danger always present, that his neighbor owning a lot by his side or in the rear of his lot may at will erect thereon a barn and fill it with combustible material or build it of material that is highly combustible, and which may at any time burn down and subject him to great loss. His insurance

under such circumstances would of course be much higher; and if it was declared that the city had no power to protect his property by prohibiting such erections, a death-blow would be struck at the prosperity, and capital would not only refuse to come to the aid of the prosperity of the city, but that already employed would be sacrificed and its former owner would leave for a place where under the law it could be protected. The ordinances are within the power conferred by the charter, at least so far as they prohibit the erection of wooden buildings within the "fire-limits" of the city.

It is insisted that they are void because they prohibit the erection of any buildings except four kinds, to-wit, brick, iron, stone and concrete. Express authority is given by the charter to the council: "To control the construction and repairs of all houses." Whether the council under the charter, has the right to prevent the erection of a zinc, marble, steel, tin, copper and brass buildings as argued, we will not here decide, as no such case is here presented. The question here is, whether it can establish fire-limits and prevent the erection of wooden buildings therein. The council has designated in its ordinances the kind of buildings usually put up in populous parts of cities, viz., brick, iron, stone and concrete. Marble is stone as I understand it, and people do not often, I believe, erect buildings of slate, tin, copper, brass and zinc.

[Omitting minor points.]

Judgment affirmed.

COUCH V. EASTHAM.

(21 W. Va. 704.)

Will — suit to set aside for mistake — evidence — declarations of testator.

In a suit to set aside a will because not expressing the testator's intentions, declarations of the testator before and after the execution are inadmissible.

SUIT to set aside a will. The opinion states the facts. The defendant had judgment below.

Knight & Couch, for appellant.

J. W. English and *J. B. Menager*, for appellee.

Couch v. Eastham.

JOHNSON, President. Samuel Couch of Mason county made his last will and testament on May 15, 1879. The first clause of the will is as follows: "I give and devise unto my son Peter S. Couch my farm on which I reside in Mason county, West Virginia, containing about 950 acres; but it being my desire to devise the property as nearly equally as may be between my two children, Peter S. Couch and Sarah Frances Eastham, I direct my said son, Peter S. Couch, to pay his sister, Sarah F. Eastham, the sum of \$4,000, and I hereby make the said sum of \$4,000, a lien and charge upon the real estate aforesaid, devised to Peter S. Couch, until the same is paid to said Sarah F. Eastham or her heirs; but in the event that said Peter S. Couch shall die leaving no lawful children surviving him, it is my will and desire that the title to all my real estate aforesaid shall pass to and be vested in my daughter, Sarah Frances Eastham, or her children, if she be not then living, upon the payment by her, or her said children, to said Mary Catharine Couch of the sum of \$4,000; but in the event that said Mary Catharine Couch shall not then be living, it is my will and desire that said real estate shall pass to and vest in my said daughter, Sarah F. Eastham, or in case of her death to her children without the payment of any thing in consideration therefor."

By the second clause he gave to his daughter all his personal property with some few exceptions, which he disposed of to others.

On September 8, 1880, he executed a codicil to said will, in which he says: "It is my will and desire that the first clause of my said will be and the same is hereby so changed as to read: 'That in the event the said Peter S. Couch shall die leaving no lawful children surviving him, but leave his wife, Mary Catharine Couch, surviving him, it is my will and desire that the title to all my real estate aforesaid shall pass to and be vested in my daughter, Sarah Frances Eastham, or her children if she be not living, upon the payment by her, or her said children to said Mary Catharine Couch, of the sum of \$2,000 instead of \$4,000, as in said will is provided, and it is my wish and desire, and I hereby request my son, Peter S. Couch, to use the timber upon the real estate devised by him, only for the purposes of the farm, and I do earnestly request that none of said timber shall be sold by him, or be sawed into lumber for the purpose of selling as merchandise.'"

Samuel Couch died in March, 1884, and his will and codicil were duly admitted to probate.

At August rules, 1884, Peter S. Couch brought his suit in equity to set aside said will, on the ground that it is not the true last will and testament of Samuel Couch, because it was executed in mistake and does not contain the intentions of the testator; that said will shows on its face that it was the intention of the testator to divide his property equally between his children, and the will shows in its bequests manifest inequality. The bill also alleges, that Samuel Couch many times had said, before the will was executed, that he intended to make his children equal in the disposition of his property, and many times after the execution of the will said that he had made them equal by his will; that he valued his farm at \$25,000 and his personal property at \$17,000, and intended to give his farm to Peter and the personal property to Sarah, and to charge the farm with \$4,000 in favor of Sarah, thus giving them \$21,000 each in property. The bill charges, that Peter's life-estate is not worth \$4,000, and that his father intended to give him the fee simple in the farm and not a life-estate. The bill prayed for an issue *devisavit vel non*, and that on the verdict of the jury a decree be entered declaring the said paper-writing not the last will of Samuel Couch deceased, and for partition of his estate between complainant and his sister equally.

The defendant, Sarah F. Eastham, answered the bill, denying that there was any mistake made by her father in the execution of his will.

On September 10, 1884, the court directed an issue *devisavit vel non*, which was tried in February, 1885, and the jury found that the said paper-writing and every part thereof was the true last will and testament of Samuel Couch, deceased. Thereupon Peter S. Couch by counsel moved the court to set aside the verdict, and to grant him a new trial, which motion the court overruled, and the plaintiff excepted.

The first bill of exceptions contains the will and codicil, the probate, the refusal of the executors named in the will to qualify, and the appointment of an administrator, and the depositions of a number of witnesses, who testified mainly to declarations of the testator made before and after the execution of the will, that he intended Peter S. Couch to have the farm, and that he intended to make and had made his two children equal in the disposition of his property, and the objection of the defendants "to so much of each and all of said depositions as tended to prove the declarations of the

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testator made by him before and after the date of the execution of the said alleged will and codicil, on the ground that it was not competent to impeach said will by the parol declarations of the testator so made;" and the refusal of the court to permit said declarations to be read to the jury, and the exception of the plaintiff to said action of the court.

The second bill of exceptions contains the proof of the mental capacity of the petitioner by the attesting witnesses, the will and codicil, the probate thereof, the refusal of the executor to qualify, and the appointment of an administrator, the proof by the plaintiff that at the time of Samuel Couch's death his personal estate was worth about \$12,000, that the rental value of the home-place devised to Peter S. Couch was about \$700 or \$800 per annum, the landlord paying the taxes, which were about \$300 per annum, and the proof that the value of the land was about \$17,000 or \$18,000.

The court certifies that these were all the material facts before the jury on the issue.

On February 19, 1885, the cause was heard on the pleadings and the verdict of the jury; and the court dismissed the plaintiff's bill with costs, from which decree the plaintiff appealed.

It is insisted by appellant's counsel, that the court erred in rejecting the evidence of the declarations of the testator. He admits that in any suit for the construction of a will parol evidence to explain, vary or contradict the will is inadmissible. 'This is a proper concession, as the authorities are uniform in support of it and are too numerous to cite. But it is contended, that when the contest is as to the execution of a will, whether there was in fact a will of the testator executed, then a different rule applies, and any parol evidence on such an issue, including the declarations of the testator, both before and after the execution of the will, is admissible. Upon the investigation of this question we will refer only to authorities in cases where the question was whether any will had been in fact executed.

It is not controverted in this cause, that upon an issue *devisavit vel non* the will of a testator or a part thereof may be declared void, for the reason that it was executed by a mistake of the testator. The mere fact that a paper has been executed with all due formality does not necessarily constitute it the will of the person so executing it, or preclude the admission of parol evidence; that it was so executed by mistake and under a misapprehension. 1 Redf. Wills, 205

The question we are now considering is: Upon an issue of "will or no will," can the declarations of the testator made before and after the execution, so far removed therefrom as to form no part of the *res gestæ*, be admitted to prove that the will was executed by mistake?

Provis v. Reid, 5 Bing. 435, was a writ of entry *sur* abatement. The demandants claimed as heirs of Henry Sara; the defendant claimed under the will of Sara. The demandants proposed to show that the will was executed in the presence of only two attesting witnesses, and that the name of a third was added after the death of the testator. The demandants prepared to give evidence of the following among other declarations made by the testator as to the will: "Tom Reid (the defendant) has been trying to get my property, but neither he nor his shall have it. Scott drew up a paper, and they got me to sign it; but never fear, I know that it is not worth to Reid one farthing." "My land goes to my own family. Peggy (one of the defendants) remember the land is yours. If I don't live to make my will, when I'm dead see that you are righted." The judge rejected the evidence. BEST, C. J., said: "It has been insisted that declarations of the testator were admissible in evidence to show that the will he had executed was not valid; but no case has been cited in support of such a position; and we shall not for the first time establish a doctrine which would render useless the precaution of making a will; for if such evidence were admissible some witness would constantly be brought forward to set aside the most solemn instruments." PARK, J., in the same case, said: "When the legislature has taken such care to prevent frauds in wills, and when it is considered how easily declarations may be extorted by artful persons, after the intellect of the testator has been impaired by time, it would be most mischievous, and a violation of all established principles to allow such declarations to be received in evidence."

Jackson v. Kniffen, 2 Johns. 31; s. c., 3 Am. Dec. 390, was on ejectment. The lessees of the plaintiff claimed as heirs at law of David Kniffen, and the defendant under the will of said David. The plaintiff offered to prove by one of the subscribing witnesses to the will and by four other persons, that the testator, on many occasions in conversation with them, whom he considered to be his friends, since the making of the will had uniformly and in the most earnest manner declared the instrument not to be his will;

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and that he was forced to execute it for fear he should have been murdered, if he did not; and that he called on these persons to bear witness to what he declared, and particularly requested the subscribing witnesses not to prove the execution of the will. The plaintiff also offered to prove that the testator on his death-bed and within an hour before his death, while expecting immediate dissolution, in a solemn manner called on one of the persons then present to bear witness, that the said instrument was not his will, but that it had been extorted from him through fear of being murdered, and that his desire was to make an equal distribution of his estate among his children. The judge ruled out the testimony; and the plaintiff submitted to a nonsuit. A motion was made to set aside the nonsuit and for a new trial on a case made, in which the above facts were stated. THOMPSON, J., said: "In whatever point of view the testimony offered is considered, I cannot but think that it was properly overruled. It could not, if placed in the strongest possible terms, amount to a revocation without a direct violation of the statute, which declares, that no will (of land) shall be revoked or altered, except by writing, executed with all the requisites of a will, or by cancelling the same. If these declarations were not to operate as a revocation, I am at a loss to see in what manner they could affect the will. To say they were proper, in order to show that the instrument in question was not duly executed by reason of its having been signed under *duress*, is assuming the very point which was to be proved. If they were legal evidence they must be so, when standing alone, unaided by any of the circumstances previously proved. * * * This will might have been executed under circumstances which ought to invalidate it; but to allow it to be impeached by the parol declarations of the testator himself, would in my judgment be eluding the statute, and an infringement upon well-settled and established principles of law." KENT, C. J., concurred, and also LIVINGSTON, J., who said: "Besides the danger of tampering with a person, who may be known to have made his will, of fraud in making use of some loose and unguarded expression to set it aside, and of perjury in fabricating declarations which may never have been made and thus revoking a will by parol, the right of cross-examining is inviolable and not to be broken in upon." SPENCER and TOMPKINS, JJ., dissented.

In *Waterman v. Whitney*, 11 N. Y. 157; s. c., 62 Am. Dec. 71, the surrogate of Broome county made an order refusing to admit

the will of Whitney to probate. An appeal from the order was taken. Issues were directed to ascertain whether the paper-writing offered for probate and refused was the will of Whitney. The questions of testamentary capacity and undue influence were involved. Evidence was offered, that the testator had stated to a witness, after he had made the will, how he had disposed of his property, which was entirely different from the disposition of it by the will. The evidence was objected to, and the objection sustained. SELDEN, J., delivered the opinion of the court, which held, that where a will is disputed on the ground of fraud, duress, imposition or other like cause, not drawing in question the testator's mental capacity at the time of its execution, neither his prior nor his subsequent declarations are evidence; but on the question of his capacity his declarations before and after the execution of the will are admissible.

Comstock v. Hadlyme, 3 Conn. 254; s. c., 20 Am. Dec. 100, was an appeal from a decree of probate establishing a will; and it was held that the declarations of the testatrix tending to show importunity and undue influence, made about the time of executing the will, were admissible only to show the testatrix's state of mind, not to prove the facts stated.

Moritz v. Brough, 16 Serg. & R. 403, was a feigned issue directed by the Register's Court to try the validity of a writing purporting to be the will of Peter Moritz. The question of the admissibility of the declarations of the testator arose, and the Supreme Court held, that to set aside a will duly executed by a man of competent understanding, evidence is not admissible of declarations made by him, that he intended differently and was importuned by his wife to make the will.

Norris v. Sheppard, 20 Penn. St. 475, was an issue *devisavit vel non*, and the court held that a will duly made by one of sound mind and memory cannot be defeated by proof of declarations of the testator, made before the will was executed, that he intended to dispose of his property in a different manner.

Boylan v. Meeker, 4 Dutch. 274, was an action of ejectment, in which the validity of a will was in issue. It was decided in that case, that where the execution of a will is proved in the mode required by law, the declarations of the testator made before or after the execution of the instruments are not competent to prove fraud, duress or forgery, or to disprove the execution of the will; they are

rejected upon the principle that they are hearsay and not under the sanction of an oath; but declarations made at the time the instrument is executed are admissible as a part of the *res gestæ*.

Gibson v. Gibson, 24 Mo. 227, was a contest as to the validity of a will; and it was held that where it is sought to invalidate a will, on the ground that the alleged testator was under undue influence and was at the time of signing the will of unsound mind by reason of intoxication, declarations made by him to the effect that he had never made the will, that if he had signed it, they had got him drunk and made him do it, for he had no recollection of it, are inadmissible in evidence.

This court had occasion to examine this subject in *Dinges v. Branson*, 14 W. Va. 100; and we then held that the declarations of a testator or grantor, made either before or after the execution of the instrument, are admissible evidence, where the issue involves the mental capacity of the testator or grantor or undue influence exerted upon him at the time the instrument was executed. After an examination of numerous authorities, referring to nearly all I have here cited, the court in its opinion says: "All the authorities agree with Judge WASHINGTON (in *Stevens v. VanCleve*, 4 Wash. C. C. 262) that such evidence is inadmissible either to control the construction of the instrument or to support or destroy its validity. The only ground upon which such declarations are held admissible is to throw light upon the mental capacity of the testator or of undue influence exerted upon him to procure the execution of the will." While the question here presented was not involved in that case, yet it was impossible not to recognize the fact, that the authorities never permitted such declarations to go in evidence to prove the truth of such declaration or to affect the validity of the will, except so far as they might show or tend to show, that the testator was mentally incompetent to make it.

If such declarations could be admitted to prove that the will was procured by fraud or duress or mistake, no man's will would be safe. The temptation to disappointed seekers after the testator's bounty to watch the testator, and as his mind grew weaker, to tamper with him and induce him to make declarations that were inconsistent with the will, would be sufficient to induce unscrupulous persons to do such miserable work, and even go further and suborn witnesses, to swear to imaginary declarations of the testator, inconsistent with the terms of his will, pretended to have been made

both before and after the will was executed. The statute, which requires the will to be in writing and properly witnessed, would afford but little protection to the testator or to the real objects of his bounty, if proof of such declarations could be admitted.

We have not found a single case that warrants the introduction of such evidence. The case of *Reel v. Reel*, 1 Hawks, 248; s. c., 9 Am. Dec. 632, clearly does not approve such a doctrine. It was one of the authorities relied on in *Dinges v. Branson*, 14 W. Va., to show that such declarations are admissible on the question of testamentary capacity and undue influence. The only case that seems to give countenance to such a doctrine is *Nelson v. Oldfield*, 2 Vern. 76. In that case the evidence was that Mrs. Bettinson, travelling into France for her health, there fell in company with the plaintiff, who having the lady in her power prevailed upon her to solemnly swear to make her will and leave her all her estate; and when she made her will accordingly, the plaintiff made her again swear that she would not alter or revoke the will or make any other. It appeared by the deposition of Mr. Wade and others examined in the cause, that she in her sickness often complained of how she had been circumvented by the plaintiff, and of the injury she had done her mother and sisters by giving her estate from them, that she heartily repented that she was thus fettered, but durst not for fear of damnation revoke or alter her will, and shortly afterward died much troubled and afflicted that she could not alter her will. The court said the will having been proved in the spiritual court, the matter was not to be contradicted here; the plaintiff might make the best she could of her probate there, but should have no aid from this court, and therefore dismissed the bill. There was no point made whether the declarations were admissible or otherwise. The mistake which will avail to set aside a will is a mistake as to what it contains, or as to the paper itself, not a mistake either of law or fact in the mind of the testator, as to the effect of what he actually and intentionally did. There was no such mistake here.

The court did not err in rejecting the evidence.

[Omitting minor matters.]

The decree dismissing the bill is affirmed.

Decree affirmed.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ALBERS v. COMMERCIAL BANK.

(85 Mo. 173.)

Bank — check — payment.

When a bank pays a check to the holder, and cancels and delivers it up to the drawer, such payment cannot be rescinded by the drawer without consent of the person to whom payment was made.

ACTION for deposit of money. The opinion states the case. The defendant had judgment below.

W. C. Marshall, for plaintiff in error.

Noble & Orrick, for defendant in error.

BLACK, J. The plaintiffs, partners under the firm name of Albers, McGinitie & Horner, sued defendant for \$3,000, which they alleged defendant received as deposit and refused to pay when requested. Albers, McGinitie & Horner, on the 22d of September, 1876, made their check on the defendant bank for \$2,602.09, payable to Caruthers & Company, who on the same day deposited it with Bartholow, Lewis & Company, and thereby made their account with that bank good. On the next day this check was cleared on

defendant, in the usual course of business. Plaintiffs and Caruthers & Company had dealings together, and this check was given partly for merchandise and partly for a check of the latter parties to the former. The merchandise amounted to some \$1,600. The excess was an "exchange" check for the accommodation of Caruthers & Company, who failed in business on the 23d of September, 1876.

The check of the plaintiffs, held by Bartholow, Lewis & Company, came to the defendant through the clearing house in the forenoon of the 23d of September, was then checked from the clearing-house file and charged to the account of Albers, McGinitie & Horner. After this, and between one and two o'clock in the forenoon on that day, a member of that firm notified Mr. Nichols, cashier of defendant, not to pay the check. The cashier then caused to be written upon the check, which had been cancelled, by placing upon a cancelling file, "cancelled by mistake." The charge upon the books was erased and the check handed to Bartholow, Lewis & Company's manager, who gave in exchange some checks and some money. Bartholow, Lewis & Company at once notified defendant that they would not receive the check. They afterward filed a complaint with the clearing-house committee. This arbitration committee determined that defendant should pay the check, which it did do, in December, 1876, and charged the amount again to the plaintiffs' account. Plaintiffs had no notice of this proceeding before the committee.

1. A customer of a bank has the right to countermand the payment of a check before it is paid, and take upon himself the consequences of such act. Morse Banks and Banking (2d ed.), 302. But he has no right to recall the check after it has been paid to one who took it in good faith and for value, nor can his banker do so for him. When timely notice not to pay is given, the burden of proof is with the bank to show that payment had been made. If the bank receives the check, pays the money or its equivalent to the holder, cancels and charges up the check to the maker, such acts must be regarded as payment, and this payment cannot be rescinded without the consent of the person to whom payment of the check was made. All these propositions were clearly enough presented by the instruction given.

2. The third instruction in substance states that if this check was given to Caruthers & Company, to use for the purpose of getting credit, and they did so use it, and the plaintiffs had funds with

the defendant sufficient to pay it, the liability of defendant to pay became fixed on the presentation of the check, and it was not in the power of the plaintiffs or of defendant to refuse payment without the consent of the holders, Bartholow, Lewis & Company. This is not a correct statement of the law. The liability of the bank to pay the check did not become fixed upon mere presentment of the check. *Dickinson v. Coates*, 79 Mo. 250. But we do not see how the plaintiffs could have been prejudiced by this instruction, taken in connection with the others and the conceded facts of the case. It does not direct a verdict. All the evidence shows that the check had been paid before notice not to pay was given by the plaintiffs. The only question of any merit is, was the payment rescinded. Upon this there was some evidence tending to show an existing custom or usage among the banks at St. Louis, by which the bank receiving a check through the clearing-house in the morning had until two o'clock of the same day in which to return it to the bank from which it came. There was also evidence to the effect that no such right existed when the check was "good" and had been cancelled. But little evidence was offered upon the alleged usage, the parties do not appear to have relied upon it, for no instructions were asked upon the subject. The existence of a custom, and what it was, are questions of fact. For these reasons we cannot dispose of the case here upon such grounds.

3. While it appears on the one hand that Bartholow, Lewis & Company notified defendant that they would not take back the check which had been handed to their messenger, and that they prosecuted their claim against defendant to successful determination before the clearing-house committee, it appears on the other that they sued the plaintiff on the check by attachment on the same day it was handed to the messenger, which suit appears to have been dismissed. In view of this evidence, plaintiff asked an instruction, that though the check was paid on the 23d of September, 1876, yet if after that, and by mutual assent of the parties, the payment was rescinded, then the defendant had no right to again pay the check and charge it to the plaintiffs. When the check came to Bartholow, Lewis & Company, it bore the evidence and assertion of the defendant's "cancelled by mistake," when in fact it had not been cancelled by mistake at all. They declined to relieve the defendant, but at the same time sued the plaintiffs. Now if they did not assent to a rescission of the payment, of which there

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is but little or no evidence, so far as the defendant is concerned, they had a right to retrace that step when informed of the real facts in the case. The instruction at first looks fair, but upon examination it will be found to be quite to the contrary, for if there was any rescission of the payment it could only be valid when made or acquiesced in after knowledge that the check had not been cancelled by mistake.

4. It was not necessary for the defendant to plead payment. If the check was rightfully paid there was no conversion. The whole record in the case of Bartholow, Lewis & Company against the plaintiffs in this case was offered in evidence and excluded. We do not see how any part of that record, save the petition and affidavit, could have been competent evidence in this cause. All the facts with respect to the bringing and dismissal of that suit were in evidence without objections, and the plaintiffs had the full benefit of any deductions that might be drawn therefrom.

The other judges concur.

Judgment affirmed.

GROLL V. TOWER.

(35 Mo. 342.)

Evidence — privileged — physician.

Under the statute, the testimony of an attending physician, if offered by the patient or his representative, is competent, but not otherwise.

THE opinion states the point.

Gottschalk & Bantz, for appellant.

Dyer, Lee & Ellis, for respondent.

EWING, C. This is an action by the widow of Ed. Groll, deceased, for damages, for injuries sustained by Groll, from which he died, by reason of the negligence of the respondent in failing to provide safe and proper machinery. The petition alleges that Groll, while in the performance of his duties at respondent's soap factory, repaired certain pipes in a tank hereinafter described; that while ascending a ladder from the tank, a platform on which the

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ladder rested gave way, precipitating him to the bottom of the tank, from which fall he sustained injuries causing his death; that the platform gave way on account of its being constructed of improper material, negligently built, and negligently allowed to become rotten and decayed and remain so. The answer of respondent admits that Groll was his employee at the time of the injury; the necessity of descending into the tank for repairs; the existence of the ladders and platform; that plaintiff is Groll's widow; also Groll's death on the day named in the petition, and alleges contributory negligence. The reply is a general denial.

On the trial in the Circuit Court, at the close of the plaintiff's evidence, on motion of defendant, the court sustained a demurrer to the evidence, and entered judgment for the defendant. Plaintiff then appealed to the St. Louis Court of Appeals, where the judgment of the Circuit Court was affirmed, and from which the plaintiff appealed to this court. There are two questions for consideration: One, did the Circuit Court err in sustaining the demurrer to the evidence? And secondly, did it err in excluding the evidence of the physician attending the patient?

[Omitting the first question.]

It is insisted, secondly, that the Circuit Court erred in excluding the testimony of the attending physician. Section 4017, Revised Statutes, reads as follows: "The following persons shall be incompetent to testify: * * * Fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." The Court of Appeals and the Circuit Court held that under this clause of the statute the evidence of the attending physician was incompetent. The Michigan statute upon the same subject is nearly identical with ours, and the Supreme Court of that State, in construing their statute, in *Grand Rapids & Indiana R. Co. v. Martin*, 41 Mich. 667, say: "The objection that a physician can not reveal, with his patient's consent, what he has learned during his treatment, is one which, if valid, would render it impossible, in either civil or criminal cases, to use the only testimony which would show the nature and extent of disease. The statute is one passed for the sole purpose of enabling persons to secure medical aid without betrayal of confidence. It is only a question of privilege, and such

communications are on the same footing with any other privileged communication, which the public has no concern in suppressing when there is no desire for suppression on the part of the persons concerned." In *Scripps v. Foster*, 41 Mich. 742, it was held that the object of the statute is to prevent the abuse of the confidential relation existing between the physician and his patient, and is for the protection of the latter.

The words of the New York statute are not the same as those of Missouri and Michigan, but convey the same meaning and provide the same privilege; and in *Pierson v. People*, 18 Hun, 239,* it was held "that the object and intent of the provision of the Code was the protection of the patient and his representatives against the disclosure of information obtained by a physician in the course of his employment as such." This case was re-affirmed in *Staunton v. Parker*, 19 Hun, 55. In *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, it was held that the right to exclude the testimony prohibited, survives to the representatives in the premises of a deceased person. In *Cahen v. Continental Life Ins. Co.*, 41 N. Y. Super. Ct. 296, it is said: "The true position is that the statute makes a peremptory rule, but as the rule is made for the benefit of the patient, he may waive the right given to him. Until there is such a waiver, the law is as plain as words can be, that the physician shall not be allowed to testify." The same construction is maintained in *Johnson v. Johnson*, 4 Paige, 460, and in *People v. Stout*, 3 Park. Cr. Rep. 670.

Where the evidence of the attending physician is offered by the patient or his representatives, it is competent and admissible. Where it is offered by the opposite party, the physician cannot testify against the objection of the patient or his representatives. The cases referred to fully sustain this doctrine, and we think the rule is based upon substantial reasons. The case of *Gartside v. Conn. Mut. Ins. Co.*, 76 Mo. 446; s. c., 43 Am. Rep. 765, was where the insurance company offered the testimony of the attending physician to prove that Gartside had had delirium tremens. This was objected to by the plaintiff, the wife of the deceased, and the objection was properly sustained. The case of *Harriman v. Stowe*, 57 Mo. 93, was a suit for damages resulting to Mrs. Harriman, one of the plaintiffs, by falling through a hatchway in a house of defendant. She offered her attending physician as a witness. The de-

* 79 N. Y. 424; s. c., 35 Am. Rep. 524.—RER.

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fendant objected because, under the statute, he was incompetent. The Circuit Court instructed the witness that he should not reveal any information received from the plaintiff while attending her in his professional capacity, which information was necessary to enable him to prescribe for her. In other words, the Circuit Court virtually sustained the objection. In commenting on this action of the Circuit Court, WAGNER, J., said: "As the court restricted the witness from giving any information forbidden by the statute, the only inquiry is, whether the evidence was admissible on any other principle." While the question of the admissibility of the physician in that case was not discussed in the briefs of counsel, and therefore not made prominent in the decision of the court, yet it undoubtedly holds the statute is a bar to the introduction of the attending physician, even in behalf of the patient himself. In this, we think, it is in conflict with the authorities upon the question, as well as with the reason of the rule.

From what has been said, it follows that the Circuit Court erred in excluding the attending physician as a witness, when he was offered by the representative of his patient. Nevertheless, for the failure of the proof to sustain the allegations of the petition in other respects, the judgment of the court below must be affirmed. For even though the physician had been permitted to testify as to the condition of the plaintiff, that would have made no case for the plaintiff, because of the lack of evidence upon the other question.

The judgment of the Court of Appeals is affirmed.

All concur.

Judgment affirmed.

STATE V. CORRIGAN CONSOLIDATED STREET RAILWAY COMPANY.

(85 Mo. 263.)

Municipal corporation—license to street railway—obligation to repave street.

Where a city grants to a street railway company the privilege of constructing and using a railway track in unpaved streets; on condition that it keep and maintain in good repair the space between the rails and for two feet on each side of the track, the city cannot compel the company to pave such space.

MANDAMUS to compel paving. The opinion states the case. The relator had judgment below.

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John C. Tamsey, for appellant.

Wash. Adams, John J. Campbell, R. H. Field and George W. McCrary, for respondent.

NORTON, J. This is a proceeding by *mandamus* begun in the Circuit Court of Jackson county to compel the defendant to pave so much of Union avenue (a street in the city of Kansas), as lies between the rails of a horse railroad operated on said avenue and owned by defendant company, and also eighteen inches on the outside of said rails along said track, in the same manner and with like material, at the same time and as fast as the balance of said street may be paved to completion. A return was made to the alternative writ and a trial had upon the issue presented, which resulted in a judgment of the court awarding a peremptory writ, from which the defendant has appealed to this court.

It appears from the record that the Jackson County Horse Railroad Company on March 27, 1869, was duly incorporated under the laws of this State as a private corporation for the purpose of constructing and operating a horse railroad over the streets of the city of Kansas; that on said day the city of Kansas granted by ordinance to the said Jackson County Horse Railroad Company the right to construct, maintain and operate a horse railroad on various streets in said city, of which Union avenue is one, for the period of twenty years. Sections 4 and 12 of said ordinance are as follows: "Section 4. The space between the rails of said track and the street for a space of two feet on either side and along the line of said track, and also all street crossings along the line of said street railroad shall be kept and maintained in good repair by said railroad company, and passing, crossing or travelling upon or along the streets and avenues, upon or along which such street railroad may pass shall in nowise be obstructed by said railroad company." By section 12 of said ordinance it was provided as follows: "Section 12. That said horse railroad company shall be governed in all respects by the ordinances of the city of Kansas regulating horse railroads, or in any wise appertaining to such roads." That no other provisions of said ordinance had any relation to the construction or repair of streets or imposed any duty or obligation upon said company regarding the construction, or repair of streets, or any pavement thereupon. That at the date of the enactment of said ordinance

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and acceptance thereof by said company, there was no general ordinance of the city of Kansas regulating horse railroads or in any wise appertaining to such roads. That by section 2 of chapter 38 of an ordinance of the city of Kansas, entitled "An ordinance in revision of the ordinances governing the city of Kansas," approved April 19, 1880, said chapter 38, relating to horse railroads, it was provided as follows:

"It further appears that the said Jackson County Horse Railroad Company, in pursuance of the right granted by said ordinance, constructed and put in operation in 1870 and 1871 several miles of street rail over the streets on which it had obtained the right to operate such road, including that part of Union avenue described in the petition; that said company and defendant company, which, in 1874, by purchase, succeeded to all the rights and privileges of the Jackson County Horse Railroad Company, had operated its said street railroad on said avenue from 1870 and 1871."

It further appears that said Union avenue, on which said railroad was operated, was on the 27th day of March, 1869, and at all times thereafter, until May, 1884, had been kept as an unpaved dirt or macadamized street, at which time the city contracted with one Hackett for paving said street exclusive of the space between the rails of said street railway, and a space of eighteen inches on the outside of said rails. Said contract provided for paving said street with Colorado sandstone blocks, to be laid upon a foundation of concrete nine inches thick; that the same was to be entirely new pavement, and as a preparation for laying the same the entire macadam and dirt surface was to be graded and removed. It further appears that the defendant, and Thomas Corrigan, as the president of the company, were notified and requested by the city engineer on behalf of the city, immediately after said work was begun by the city, to proceed to lay down and construct a pavement between the rails of said railroad track on said avenue, and for a space of eighteen inches on the outside of the rails with the same kind of materials upon the same kind of foundation at the same time, and as the paving of the street progressed; that the defendant refused to comply with the request, but proceeded to lay down a pavement between the rails of said track, composed of stone blocks taken from a quarry at Argentine, Kansas, which were of the same dimensions of the Colorado sandstone blocks being used by the said Hackett; that at the commencement of these proceedings the said paving between the rails

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was being done by the defendant more rapidly than the remainder of the street was being done by the contractor of the city; that the said pavement so laid by defendant in no way interfered with public travel and presented as smooth and regular a surface as that laid by the city.

Upon the refusal of defendant to comply with the above request of the city engineer, this proceeding was instituted to compel defendant to pave said street between its rails, and for a space of eighteen inches outside of them, with the same kind of material and in the same manner the street was being paved by said Hackett under his contract with the city. The city bases its title to the relief it seeks in this proceeding mainly on the following ordinances, the first one of which was adopted on June 29, 1880, and the second on May 24, 1884. They are as follows:

“Section 1. No person, company or corporation, nor any person as president, superintendent, or other officer or agent of any street or horse railroad company or corporation shall keep, use or maintain any street or horse railroad track or part of a track, upon any street or part of a street, in the city of Kansas, which said street or part of said street is now or may hereafter be paved with blocks of wood, stone, granite or other material unless the space between the rails of such track, and also the space adjoining and on the outside of such rails for the distance of eighteen inches in width, shall be paved with like blocks of stone, wood, granite or other materials in the same manner and for the same distance lengthwise that the balance of said street or part thereof may be paved.

“Sec. 2. No person, company or corporation, nor any person as president, superintendent or any other officer or agent of any horse railway company or corporation shall run, operate or maintain any street or horse railway in the city of Kansas, unless the space between and on the outside of the track thereof be paved as required by the preceding section.

“Sec. 5. Any person, company or corporation, or any president, superintendent or other officer or agent of any street or horse railway company or corporation violating any provision of section one (1), two (2) or four (4), of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof before the city recorder shall be fined not less than one hundred nor more than five hundred dollars.”

The ordinance of May 29, 1884, is as follows:

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"Section 1. It shall be the duty of every individual, company, or corporation owning or operating any horse or street railroads now constructed, or that may hereafter be constructed within the limits of the city of Kansas, to pave the space between the rails of such railroad, and eighteen inches on the outside thereof, immediately adjoining the outside rails as the roadway beyond such limits may be paved. If the roadway be paved with stone or wood, or other materials, such space between the rails and eighteen inches outside shall be paved with stone or wood, or like material of the same quality, equally as good and in a similar manner, and upon the same specifications as the balance of the roadway shall be paved."

"Sec. 3. This ordinance is declaratory of the duties prescribed in an ordinance entitled, 'An ordinance to regulate street railways, and requiring them to pave their tracts and keep the same in repair,' approved June 29, 1880, and is not intended to repeal or supersede any part of said ordinance."

"Sec. 4. Such paving between such rails and eighteen inches outside thereof shall be done at the same time that the balance of the street is paved, and as fast as such paving progresses to completion. In case any railroad track shall be constructed or reconstructed on, along, or across any street already paved, it shall be the duty of the person, company or corporation owning or operating such road to pave the track and eighteen inches outside thereof, as required by this ordinance, as fast as such track shall be laid, constructed, or reconstructed, so as to have such space paved immediately upon the completion of such laying, construction, or reconstruction."

It is argued on the part of the defendant that neither under the charter of Kansas City, nor under the ordinance of March 27, 1869, by virtue of which it constructed and operated its road, did it assume an obligation to pave any portion of said street in any manner, but that the only obligation it did assume was to keep and maintain in good repair the space between its rails and two feet thereof on the sides and along the track of its road, and all street crossings along the line of said track, and that the said ordinances of June 20, 1880, and May 24, 1884, are void as to defendant, because they are violative of the agreement made between it and the city by the ordinance of March 27, 1869, in that it sought by them to impose a new and additional burden on defendant, namely, the

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reconstruction of Union avenue by putting down a new pavement, when under its contract with the city it is only chargeable with the obligation to repair. On the other hand, it is contended by counsel that the said ordinance, relied upon by defendant, afforded it no protection in the present proceeding, because the charter of the city of Kansas at the time of its adoption contained no provision expressly authorizing it to grant rights to street railways, or authorizing it to make contracts for the construction and operation of street railroads in the streets of said city; that under its charter the city only had the right to license or permit the laying of tracks in the streets in short lines and subject to revocation at the pleasure of the city; that the city, under its charter, did not have the right to enter into a contract with a corporation or other person authorizing the construction of a street railroad and its operation for a specified and limited time. The charter of Kansas City at the time the ordinance relied on by defendant was adopted, while it expressly gave to the city the power to open, grade, improve and curtail its streets, did not give it in express terms the right to authorize a street railroad to be constructed and operated on them, and because this power was not thus conferred, it is insisted that the ordinance of March 27, 1869, either is a license or a contract.

As to the power of a municipal corporation to grant the use of its streets for railways, a marked distinction is taken by the authorities between railways operated by steam and those operated by horses and mules. After an examination by Mr. Dillon of all the reported cases upon the subject of railways in streets, including the case of *Davis v. Mayor of New York*, 14 N. Y. 506; s. c., 67 Am. Dec. 186, and other cases cited by counsel for plaintiff, he states in section 727 of his work on Corporations, as the conclusion and result of such investigation the following:

"As respects ordinary railways operated by steam, and street railways operated by horses, legislative authority is necessary to warrant them to be placed in streets or highways. The legislature may delegate to municipal or local bodies the right to grant or refuse such authority. The usual powers of a general nature in municipal corporations over streets are not sufficient to confer upon them the right to authorize the appropriation of streets by ordinary railroads, whose tracks are constructed in the usual manner, and whose trains are propelled by steam, but it is otherwise as respects horse railways, and the ordinary powers of municipal corporations

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are usually ample enough, in the absence of express legislation on the subject, to authorize them to permit, or refuse to permit, the use of streets within their limits for such purposes. But they can not by an implied power confer corporate franchises or authorize the taking of tolls. This must come from the legislature."

The reason for this distinction may be found in what is so well stated in the cases of *Hinchman v. Patterson Horse R. Co.*, 2 C. E. Green, 75, and *Jersey City and Bergen R. Co. v. Hoboken R. Co.*, 20 N. J. Eq. 69, in the last of which it is said: "That the operation of a horse railroad is a legitimate use of the highway and an exercise of the public right of travel. In general, the cars carry persons from any one point on their line to any other point to which they may desire to go. The courts must notice the fact that these street railways have become an important and valuable institution in all our cities and towns, especially valuable to persons of small or moderate means, and their chief value to the many consists in their being in the public streets. If placed in the rear or any distance from the streets their value would be small. They are but a means of using the public streets to a greater advantage for the very purpose for which they were laid out, free and quick transit from one point to another; they are the best and cheapest mode yet devised, and they do not hinder the use of the rest of the street for public travel, and hardly and in a very small degree obstruct the travel on the part occupied by the tracks, except the few inches covered by the iron rails. The cars exclude other vehicles from the space occupied by them when in motion; so do omnibuses and drays. They have when in motion the right of way upon their own track, both as against those whom they meet and those who go in the same direction; a little more extended than the exclusive right of others which have only the exclusive right to one side of the road as against those whom they meet, but it is in principle the same."

If as stated by Mr. Dillon in the section above quoted, and if as held in the case of the *Atchison St. Ry. v. Missouri Pac. R. Co.*, 31 Kans. 660, and *Brown v. Duplessis*, 14 La. Ann. 842, the right of control granted to a municipal corporation over its streets carries with it the power to allow such corporations to grant a permit to a horse railroad company the right to construct and operate its road over its streets, the road ordinance of March 29, 1869, must be held valid. The only condition or burden annexed to the privi-

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lege given by the ordinance to defendant, to construct and operate its road, was that it should keep and maintain the space between its rails and a space of two feet on either side the line of its track, and all street crossings along its line in good repair. The obligation to repair a street is one thing, and the obligation to reconstruct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it. Without torturing the language of section 4 of the ordinance of 1869, and turning it away from its ordinary meaning, we cannot construe it so as to impose on defendant an obligation to reconstruct a street when in express terms it says the street shall be maintained and kept in good repair. The following authorities hold that an obligation to repair a street is not an obligation to construct thereon a new pavement: *Chicago v. Sheldon*, 9 Wall. 50; *District of Columbia v. Washington R. Co.*, 4 Am. and Eng. Rail. Cases, 174, the principle announced in the case of *Chicago v. Sheldon* is approved.

So in the case of *Farrar v. City of St. Louis*, 80 Mo. 379, where the charter of the city of St. Louis provided that the cost of repaving all streets should be paid out of the general fund of the city, and when the city council had passed an ordinance requiring the pavement on Washington avenue to be taken up and the same to be repaved with granite laid down on the concrete foundation, and providing that the cost of such repairing should be assessed against and paid by the persons owning property fronting on the avenue, according to the frontage, some of the property owners resisted the payment of the cost of repaving on various grounds, one of them being that the repaving of the avenue was nothing more than simply repairing it, and that the city, by virtue of its charter provision, was bound to pay the cost of the work out of the general or common fund, and that it was not chargeable against the persons owning property abutting on the avenue. The court held that the property owners, and not the city, were liable for the cost of the whole, putting its decision on the ground that the reconstruction of the street and laying down upon it a new and different pavement was not repairing it.

It has been argued however by counsel, that conceding the defendant was not bound by the ordinance of 1869, to pave, but only

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to maintain and keep it in good repair, as therein provided, the obligation to do so was imposed by the ordinance of 1884. We are authorized to assume that at the time the ordinance of 1869 was adopted, the representatives of the city had in their minds, first, the propriety and expediency of granting the right to the company of operating its railroad on the streets of the city, and the length of time the right to do so should exist; and second, the terms and conditions which should be annexed to the grant. The only condition imposed, in so far as the ordinance relates to the streets on which the railroad was to be operated, was that the company should maintain and keep certain parts of them in good repair. The company had the right to conclude in accepting the grant with only the above condition annexed, that in so doing it could not be charged with any other obligation than that of repairing so much of the streets as the ordinance specified. The ordinance, when accepted, was the contract of the parties, and fixed their respective rights and obligations. The said ordinance of 1884 undertakes to change this contract without the consent of the other contracting party by the imposition of a new and different obligation. This cannot be done unless we ignore the principle that it takes two to make a contract, and two to alter or change it when made. As a consideration for the grant, the company bound itself to keep in repair certain parts of the streets, and to that extent agreed to relieve the city from the payment of costs for such repairs. If after acceptance by the company of the grant with the said condition annexed, and the construction of its road at great cost, the city could, as it undertook to do in the ordinance of 1884, impose the new and additional obligation of paving a certain part of the street, why might it not require it to pave at its own cost the entire street, and keep it in repair when thus paved?

It is further contended that even if the city council had the power to contract for the construction and operation of street railroads, in exercising such power it could not alienate the control of the streets and of street improvements vested in the council by the charter. We recognize, in all its broadness, the doctrine laid down in section 97, *Dillon on Corporations*, where it is said: "Powers are conferred upon municipal corporations for public purposes, and as their legislative powers, as we have just seen, cannot be delegated, so they cannot be bartered or bargained away. Such corporations may make authorized contracts, but they have no power as a party

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to make contracts or frame by-laws which shall cede away, control or embarrass their legislative governmental power, or which shall disable them from performing their public duties." While we recognize the soundness of the principle invoked, we cannot see that it has any application to the ordinance in question. If by the ordinance of 1869, the council had delegated to the company its control over the streets, or disabled themselves from taking up the macadam and dirt surface of Union avenue or any other street, and reconstructing it with a different pavement, we would have no hesitancy in declaring it to that extent void. But such is not the effect of the ordinance, and it is not susceptible of being construed so as to deny to the city council the right at any time to improve the streets on which defendant is operating its railroad, or any of them, by macadamizing them, or laying down thereon stone or granite pavement and charging the cost thereof against the property adjacent or abutting on the streets thus improved, as is provided in the charter. There is nothing in the ordinance forbidding, either expressly or by implication, the exercise of such control by the council over its streets, but on the contrary, when such power is exercised and the street improved, the obligation of defendant to maintain and keep it in repair between the rails of the company's track and the space of two feet on the outside thereof would at once attach. Nor is the power of the council to provide the manner of repairing the street, and requiring the defendant to repair it in any way prescribed, interfered with or delegated by the ordinance. It only provides that such repairs shall be made by defendant at its own cost, and to the extent that the city is thus relieved from the payment of such costs, it is beneficial to the public.

It is also insisted that the ordinance of 1884 can be maintained on the ground that it is a proper exercise of the police power of the city, and that such power cannot be bargained away. Police power, if capable of a definition, is defined as follows, by Mr. Cooley, in his work on Constitutional Limitations, in chapter 16: "The police power of a State in its comprehensive sense embraces its whole system of internal regulation by which the State seeks not only to preserve the public order and prevent offenses against the State, but also to establish for the intercourse of citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of

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rights by others." We cannot perceive how it can be claimed that the said ordinance of 1884, which it is said imposes upon defendant the duty of paving a part of the streets on which it operates its railroad, under a grant from the city, obliging it to repair and not to repave, is embraced within the police power of the city as above defined, especially so in view of the fact that the city had full power conferred on the council by its charter to do the very thing it seeks to require defendant to do by virtue of said ordinance. The city could not, under the pretense of exercising its police power, shift the duty delegated to it by its charter of paving the streets, if public good required it to be done, and charging the cost to adjacent property owners, from its shoulders on to the defendant. Had the ordinance of 1869 provided that the city would not undertake to make regulations as to the operation of defendant's railroad as to the speed at which its cars should be run, the length of time they should stop at its terminal points, the number of hours in the day they should be run, etc., the principle invoked by counsel, that the police power of the city could not be bartered away, would apply. Instead of doing this however the city, by section twelve of the ordinance, expressly provided that said horse railroad company shall be governed in all respects by the ordinances of the city of Kansas regulating horse railroads, or in any wise pertaining to such roads. We cannot give the above section of the ordinance the constructions claimed for it by counsel, and so construe it as to make it nullify section four of the ordinance; to do so would be a violation of a well-established and universal canon of construction, viz., that the provision of all laws, ordinances and contracts should, if practicable, be construed so that all of them may stand and be made operative. We think it entirely practicable so to construe said section twelve as not to bring it in conflict with section four, by holding it to refer to such regulations as are provided in section two, chapter thirty-eight, of the ordinance of the city of Kansas, heretofore referred to, and which provides that "on all regular routes the cars shall be regularly run for the period of not less than sixteen hours, or longer, if the common council by resolution so order, during each and every day of the entire year, and shall not be allowed to stand longer than fifteen minutes at either terminus of the road. Cars on such regular lines shall be run at intervals not exceeding five minutes." Such obligations as the above are a proper exercise of

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the police power, but to extend it so as to make it include said ordinance of 1884, which imposes a duty on defendant, which by the charter is imposed on the city council, would be stretching it beyond the limits prescribed by the authorities.

We cannot give our assent to the doctrine contended for, that by virtue of the ordinance of 1869 defendant obtained simply a license to expend large sums of money in constructing its railway, and at a time when the success of such a scheme was experimental, equipping it at great cost, assuming an obligation to keep in repair a certain part of the street, which license was and is revocable at the pleasure of the city. If, as we think, the authority herein cited establishes the proposition that the general power of control given the city in its charter over the streets carries with it a street railroad operated by horses or mules, to be constructed and operated on and over its streets, when the city exercises the power as it did in the passage of the ordinance of 1869, and granted, permitted or licensed defendant to build and operate its railroads, and defendant accepted the grant, expended large sums of money on the faith of it, and was permitted by the city to do so, the license referred to was a contract, the terms of which are binding on both parties to it. If any one thing is guarded in the law more particularly than another it is the inviolability of a contract, and all attempts to impair such obligations, under whatever guise they are made, whether directly or indirectly, must prove abortive. *State v. Miller*, 66 Mo. 329; *State v. Miller*, 50 Mo. 129; *Hovelman v. K. C. Horse R. Co.*, 79 Mo. 632.

In determining this case we have not taken into consideration the amendment to the charter of the city made in 1870, holding as we do that any rights of defendant acquired the charter as it existed previous to and at the time the ordinance of 1869 was adopted were unaffected thereby. *City of St. Louis v. Mo. R. Co.*, 13 Mo. App. 524. For the reasons herein given, the judgment of the Circuit Court awarding a peremptory writ of mandamus is hereby reversed, with the concurrence of all the judges except Judge BLACK, who, having heretofore been of counsel, did not sit.

Judgment reversed.

PRIEST V. CHOUTEAU.

(85 Mo. 398.)

Partnership — division of profits — real estate.

Several parties hired a theater for a term of years and carried it on under an agreement to divide the profits in a specified proportion at the end of each year, reserving a certain proportion to meet contingent losses. One of the parties mortgaged his interest in the leasehold to secure his private debt. *Held*, that the arrangement was a partnership, and the mortgage was subordinate to the partnership debts, and that the mortgagee having notice of the equitable rights of the other parties, should not be protected as against their claims.

EJECTMENT. The opinion states the case. The defendant had judgment below.

A. J. P. Garesche, for appellant.

Hermann & Reyburn, for respondent.

EWING, C. Plaintiff commenced an action of ejectment in the Circuit Court of St. Louis against the defendant to recover possession of the undivided half of a leasehold estate in the property known as "DeBar's Grand Opera House." The answer sets up that on the 15th of June, 1877, and prior thereto, defendant, Ben DeBar, and Alice Wakefield, through her trustee, Taylor, were partners under the style of "DeBar's Grand Opera House," engaged in the business of running and managing a theater on the premises, which was partnership property and used as such. That they were interested in said property and business as follows: DeBar one-half, defendant one-sixth, and Alice Wakefield one-third. That on the 15th of June, 1877, De Bar gave a deed of trust on his undivided half to secure a debt due by DeBar individually to John G. Priest; and plaintiff claims under a deed from the trustee, by virtue of a sale under this deed of trust. That on August 26, 1877, DeBar died, and defendant, by request of Priest and Mrs. Wakefield, and under an order of the Probate Court, was appointed as administrator of the partnership effects as surviving partner; that as such, by order of court, he sold the interest of DeBar in the opera house; that one Jno. W. Norton became the purchaser, and

to whom the possession was delivered. That the entire partnership property was insufficient to pay the debts of the firm. That Jno. G. Priest, on the 15th of June, 1877, and plaintiff, Frederick R. Priest, had notice of the fact that said leasehold was partnership property belonging to and used by said firm in the prosecution of their business.

Both parties claim through Ben DeBar. The property was a leasehold, the term expiring on the 1st day of January, 1883, and was the property known as the "Grand Opera House," in the city of St. Louis. On the 13th of May, 1873, DeBar acquired this leasehold from Truman Martin and wife, and on the 23d day of May, 1873, a contract was entered into between DeBar and the trustee of Alice L. Wakefield, she being a married woman, by which said Alice was to acquire a one-third interest in said theater property and its profits. The agreement is in the following words: "This memoranda of agreement made and entered into this 23d day of May, A. D. 1873, by and between Benedict DeBar and Daniel G. Taylor, trustee for Mrs. Alice Wakefield, witnesseth: That in consideration of \$3,333.33 in cash paid, and the payment of the additional sum of \$10,000, for which a promissory note has this day been given, it is agreed by Ben DeBar that said Daniel G. Taylor, as such trustee, shall have one-third of all the profits derived from the Grand Opera House property on Market street, the same to be managed and controlled by said Ben DeBar as exclusively as though owned by him during the continuance of the leasehold estate purchased by said Ben DeBar from Truman Martin and wife; all profits to be accounted for by said Ben DeBar on the first day of each month; and the one-third of the profits of the previous month, less twenty-five per cent to be reserved to meet any losses that may occur, to be paid to said Taylor, as such trustee; such twenty-five per cent so reserved to be carried to the account of the next month following; and when the said note of \$10,000 is paid according to the tenor thereof, then a one-third of the building and property mentioned and referred to shall be by deed conveyed to said Daniel G. Taylor, as such trustee; but the management of said premises shall continue in like manner as herein set forth, and in the event that said note for \$10,000 is not paid when due, the title to said property to fully remain in said DeBar, released from all claim and interest of said Taylor, as such trustee, and until the payment of said note the profits to be re-

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tained by said DeBar to be applied upon said note; and in the event of a failure to pay said note when due, one-half of the \$3,333.33; this day paid shall be repaid to said Taylor as such trustee, and the balance shall be, with all interest of said Taylor as such trustee hereunder, forfeited to said Ben DeBar and forever terminated.

“BEN. DEBAR, [L. S.]

“DAN’L G. TAYLOR, [L. S.]

Trustee of Alice L. Wakefield, [L. S.]”

The deferred payments mentioned in the agreement were paid out of the profits of the theater, and a deed was executed to the trustee of the said Alice on or about the 26th of April, 1875, conveying said one-third interest. Another deed covering the same purchase was made between these parties, dated December 13, 1873. Both deeds convey this same interest, subject to the provisions of said agreement; and in both deeds John G. Priest executes the conveyance as attorney in fact of Harriet, the wife of Ben DeBar. Both deeds were duly recorded; the former on the 30th of April, 1875, the latter on December 15, 1873.

By deed dated December 15, 1873, DeBar and wife conveyed to Charles P. Chouteau, defendant in this action, an undivided one-sixth interest in the same property; the deed contains the following provision: “This conveyance however being subject to the terms and conditions of a certain contract made between the parties hereto on the 23d day of May, 1873, which contract is in its terms and provisions similar to a certain other contract of same date between Benedict DeBar and Daniel G. Taylor, trustee of Alice Wakefield.” This deed too is executed by John G. Priest, as attorney in fact, of Harriet DeBar, on the 19th day of September, 1873, and is duly recorded. “That Ben DeBar, D. G. Taylor, as trustee of Mrs. Alice B. Wakefield, and Charles P. Chouteau, in the month of May, A. D. 1873, each acquired an undivided interest in the leasehold premises in controversy herein, said interests being respectively one-half, one-third and one-sixth, and that said leasehold consisted of a theater building and all the furniture, scenery and properties therein contained. That said building, furniture, etc., was acquired, as aforesaid, for the express purpose of being operated as a theater, by the parties above named, for their mutual benefit and profit, under the management of Ben DeBar; and the same was so operated from May, 1873, until August, 1877, when said DeBar died. That said business, during the period last speci-

fied, by agreement of said parties, was conducted by said parties in the following manner: Books of account were kept by Ben DeBar in the name of 'DeBar's Grand Opera House,' wherein were entered all the receipts and expenses of the business conducted therein, including the ground-rent of said leasehold; and at the end of each theatrical season the net profits were divided among the three partners above named in the proportions of one-half, one-third and one-sixth; but that at the end of each year twenty-five per cent of the net profits accruing to each party, as aforesaid, were set apart and carried forward to the account for the succeeding year for the purpose of meeting any loss that might be sustained during such season. Transcripts of such accounts were furnished each year by said DeBar to Taylor, trustee, and Chouteau, and said books of account were frequently examined in behalf of Mrs. Wakefield, and occasionally by Chouteau. A bank account in the name of 'DeBar's Grand Opera House,' was also kept, separate and apart from the individual account of Ben DeBar, and the moneys realized from said business were deposited to the credit of such account, and the expenses paid therefrom. So far as Mrs. Alice L. Wakefield was concerned there was no agreement exempting her from losses incurred in the business, but as between DeBar and Chouteau there was an oral agreement exempting the latter from losses beyond the amount of twenty-five per cent of the net profits set apart as a reserve fund at the close of each year's business." That by consent of the parties above named debts were also contracted in the name of DeBar's Opera House, during the continuance and in the prosecution of said business. That after the death of Ben DeBar, by mutual consent of Alice L. Wakefield, Charles P. Chouteau, and the personal representatives of Ben DeBar, the defendant in this action qualified as administrator of the firm or association of persons transacting business, as aforesaid, and as such surviving partner took possession of the entire leasehold, premises and property aforesaid, as forming part of the partnership assets, and sold the same in that character under an order of the Probate Court, prior to the institution of this suit, at which sale John W. Norton became the purchaser. There were no instructions asked or given.

The Circuit Court found for the defendant, holding, as a matter of law, under the facts, that DeBar, Mrs. Wakefield and Chouteau were partners in the theatrical business, and the leasehold was partnership property. That at the time plaintiff pur-

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chased at the trustees' sale in 1879 he knew defendant held possession of the leasehold as surviving partner; and that it had been inventoried as partnership property. From this judgment the plaintiff appealed to the Court of Appeals at St. Louis. That court affirmed the judgment of the Circuit Court, and plaintiff comes here by appeal.

The first and vital question in the case is as to the partnership. Under the facts, were DeBar, Mrs. Wakefield, through her trustee, and Chouteau partners? No general rule can be laid down which will determine the question of partnership in every case. Each case must, in great measure, be governed by the facts and circumstances surrounding it. *Donnell v. Harshe*, 67 Mo. 170. It is held in this State that a mere division of profits does not necessarily constitute the parties partners. *McCauley v. Cleveland*, 21 Mo. 439; *Campbell v. Dent*, 54 Mo. 325; *Donnell v. Harshe*, 67 Mo. 170. In *Parsons on Partnership* it is said: "And although it is undoubtedly true that in much the greater number of partnerships there is a community of loss as well as of profits, the weight of authority, as well as of reason, seems to be decidedly in favor of the rule that there may be a legal and valid partnership, although one or more of the partners are guaranteed by the others against loss. It would seem there must be a community of interest for business purposes." *Para. Part. 41.* In *Macclay v. Freeman*, 48 Mo. 234, it was said: "An agreement that something shall be done or attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the essential characteristic of every partnership, and is the leading feature in every definition of the term." In *Pleasants v. Fant*, 22 Wall. 120, it is held that one of the approved *criteria* of the existence of a partnership is the right to compel an account of the profits in equity. In *Parsons on Partnership*, p. 58, it is said: "It should be added, that whether two or more persons are partners as to each other must generally, and perhaps always, be determined by the intention of the parties, as the same is expressed in the words of their contract, or may be gathered from the facts, and from all the circumstances which are available for the interpretation or construction of the contract."

In the case at bar it very clearly appears that the parties, Chouteau and Mrs. Wakefield, purchased their respective interest in the leasehold for the sole purpose and intention of carrying on the business of a theater. The deeds they received, and the agreements en-

tered into unquestionably indicate this. After the business was entered into it was carried on in the name of "DeBar's Grand Opera House;" a special account in bank was opened in that name, and debts contracted in that name. The deed and agreement entered into between DeBar and Mrs. Wakefield leave no doubt of the intention of those parties and show their community of interest; and the deed to Chouteau clearly comprehends just such conditions as had been imposed on Mrs. Wakefield, and leaves, to my mind, the situation equally clear as to DeBar and Chouteau. The acts of the parties in writing and otherwise, the transaction of all the business and the circumstances surrounding the whole case, lead to the inevitable conclusion that they were partners, made so by the operation of law, upon their own acts.

The next question is, was the leasehold partnership property? It is now considered as settled law that when real estate is partnership property, it is bound for all the debts of the concern, and for all advances made by any of the partners, as though it were personal property. The accounts must be settled between the partners, and all partnership debts must be paid, before any creditor of an individual member of the firm, or his heir or representative can take. In *Duryea v. Burt*, 28 Cal. 569, it is said: "If two or more persons acquire a mining claim for the purpose of working the same, * * * and actually engage in the enterprise, and share according to the interest of each, the profit and loss, the partnership relation subsists between them, though there is no express agreement between them to become partners, or to share the profits and losses. The mining ground belonging to and worked by a mining partnership and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property. Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern, and for money advanced by him for its use which he may enforce in equity, even if there has been no agreement among the partners that such lien exists." The same rule is approved in *Divine v. Mitchum*, 4 B. Monr. 488; s. c., 41 Am. Dec. 241; *Winslow v. Chiffelle*, Harper Eq. 25; *Carlisle's Adm'r v. Mulhorn*, 19 Mo. 57. And this rule is not varied, even though one partner shall mortgage his interest to secure an individual debt.

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The interest thus mortgaged would remain subject to the prior lien for partnership debts.

In *Rossum v. Sinker*, Supreme Court of Indiana, reported in 13 Central Law Journal, 202, it is said: "The rule unquestionably is, that the heirs of a deceased partner have no interest in the real estate owned by the firm until all the partnership debts have been paid. Until all debts have been paid, the surviving partner has the real, substantive interest. * * * Certain it is however that the land of partnership is, in many very essential respects, radically and materially different from land owned by an individual. It is also certain that the surviving partner has the substantive interest in such property, and unquestionably the right to own, hold and sell it for the purpose of settling up firm affairs and paying firm debts." See authorities cited in that case. See also *Burnside v. Merrick*, 4 Metc. 537; *Dyer v. Clark*, 5 Metc. 562; s. c., 39 Am. Dec. 677. In *Jones v. Parsons*, 25 Cal. 104, it is said: "The same result would accrue in case of the sale under execution of the legal interest of a partner, in the partnership real estate, as in the personal property. The partners are regarded at law as tenants in common, but in equity the property is treated as vesting in them in their partnership capacity, the beneficial interest being held by them in trust until the partnership account is settled and the partnership debts are paid." From what has been said we are led to the conclusion that this leasehold was partnership assets properly in the hands of the surviving partner, and subject first to the debts of the concern.

It seems to be the recognized doctrine that an innocent purchaser or mortgagee, from an individual partner of real estate belonging to the partnership, would be protected unless he had notice of the equitable rights of the firm in the premises. In *Matlock v. James*, 13 N. J. 126, it is said: "One partner cannot convey to a creditor of his own, so as to give him a preference over the creditors of the firm, his undivided interest in the real estate belonging to the firm, although the title to such property stands in the individual names of the partners, such grantee having notice of the equitable rights of the firm in the premises." The question of notice was the turning point also in *Ford v. Herron*, 4 Munf. 316, and the doctrine recognized in *McDermot v. Lawrence*, 7 S. & R. 438; s. c., 10 Am. Dec. 468. In *Frink v. Branch*, 16 Conn. 260, it was held that if the property mortgaged was partnership property

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and the mortgagee had actual or constructive notice of that fact, the solvent partners would have a lien upon it for the payment of debts due by the partnership.

The fact of notice would seem to be conclusive. The Circuit Court, to which the questions of fact were submitted, so found, with all the evidence before it, and that finding would not be overturned unless the evidence would most clearly lead to a different conclusion. But we have examined the evidence and must say the finding of the Circuit Court is the conclusion to which the evidence most strongly leads. The *cestui que trust*, John G. Priest, as attorney in fact, for Mrs. DeBar, signed the deed from DeBar and wife to Mrs. Wakefield, in which is embodied the agreement in writing, which is the foundation of the partnership. The evidence also strongly tends to prove that he was the confidential friend of DeBar for years, and had knowledge of the condition of his business. The plaintiff, Frederick R. Priest, when he became the purchaser under the deed of trust, must have known that the defendant was in possession of the opera house as the surviving partner, and had been as such carrying on the business. The leasehold had been inventoried as partnership property. His suit was commenced on the day of the sale to the purchaser, Norton, by the surviving partner, Chouteau; and from all the facts and circumstances the conclusion is irresistible that the plaintiff had notice of the claim that the opera house was partnership property, and cannot therefore be protected as an innocent purchaser without notice.

[Omitting other points.]

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

All concur, except HENRY, C. J., absent.

SMITH V. ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY.

(85 Mo. 418.)

Negligence — railroads — contract — passenger.

By contract between the Missouri Pacific Railway Company and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis, the Missouri Pacific Company using its own locomotives and

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crews, and the defendant furnishing at its own expense all the train men, the manner of running the trains and the control of the train men being subject to the rules and regulations of the Missouri Pacific Company. *Held*, there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for him to alight at his destination between St. Louis and Pacific, the deceased having purchased his ticket from the Missouri Pacific Company, for transportation from St. Louis to Webster where the accident occurred.

ACTION for death by negligence. The opinion states the case. The defendant had judgment below.

C. F. Moulton, Franklin Ferris, and Edwin Silver, for appellant.

John O. Day, for respondent.

HENRY, C. J. The defendant owns and operates a railroad, whose eastern terminus is the town of Pacific, about thirty miles west of St. Louis, and its trains are hauled back and forth between Pacific and St. Louis by the Missouri Pacific Railway Company over its road, under a contract between the companies, in substance as follows: First. The Missouri Pacific Railway Company, party of the first part, agrees to furnish for defendant for five years, commencing January 1, 1879, "depot facilities for the handling of defendant's freight, and office room for its agents and clerks." "Second. The said party of the first part agrees * * * to transport all of the passenger trains of defendant passing to and from St. Louis, to and from the point of junction of the roads of the parties of the first and second part, at Franklin or Pacific, and the Union depot at St. Louis." "The party of the first part to furnish at its own expense the locomotive and crew of same," and defendant to "furnish at its own expense all train men for the care and management of said trains." Defendant's "trains, and the control and acts of said train men" are "subject to the rules and regulations" of the Missouri Pacific; that defendant should "clean and care for the inside of its trains," and also defendant to pay "all expenses made and incurred on account of the use and occupation by its trains of the property and facilities of the Union Depot Company at St. Louis." Third. The Missouri Pacific to "transport all of the freight trains and freight cars" of defendant "passing between St. Louis and Pacific at its own expense." Fourth. Missouri Pacific to transport all "passenger cars and

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trains" of defendant "with all reasonable promptness and dispatch;" the defendant to "furnish free of mileage or other expense all the passenger or freight cars for the performance of its business between" St. Louis and Pacific. Fifth. The defendant agrees to indemnify the Missouri Pacific "against all loss or liability" on account of "any accident or damage" received on the road "through the fault or negligence" of the defendant, "or its agents or employees." Sixth. For the services so rendered by the Missouri Pacific for the first two years defendant agrees to pay "eleven per centum," and for the balance of the time "eleven and one-half per centum" of the "entire amount of all the gross earnings of the defendant made and received by it on any and all of its passenger, freight, or other business which passes or is transported over the road" of the Missouri Pacific. The Missouri Pacific to "have access to the books and vouchers" of the defendant to "ascertain the amount of the gross earnings provided for in this agreement." Which contract was, on the day aforesaid, signed and their respective corporate seals affixed.

On the 25th of June, 1879, George E. Smith, husband of plaintiff, took passage at St. Louis on a train of cars owned by defendant, except the locomotive, which belonged to the Missouri Pacific, to go to Webster, a station on the Missouri Pacific railroad between St. Louis and Pacific, under a commuter's ticket purchased by him of the Missouri Pacific Railroad Company. The train arrived at Webster about ten o'clock at night and stopped at the depot for passengers to get on and off. It was a dark night and the depot was not lighted, and in the act of getting off, or immediately after getting off, Smith fell between two of the cars, and at that moment the train started, and passing over him inflicted injuries of which he died soon after, and his widow instituted this suit against the defendant to recover damages. The negligence alleged is that the train did not stop long enough to allow the deceased a reasonable time to alight, and that the depot was not lighted.

The principal and controlling question in the case is, whether, under the agreement between the companies, the train in question passing over the Missouri Pacific road between Pacific and St. Louis is to be regarded as defendant's train in a sense that makes it liable for injuries occasioned to the deceased by the negligence of the train men. If answered, as we think it must be, in the negative, the judgment should be affirmed. By the terms of the contract

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the train of the defendant company was to be drawn over the Missouri Pacific road by the Missouri Pacific Company, the latter using its own locomotive and crew, and the train men to be furnished by the defendant, but the Missouri Pacific Company reserved the entire and exclusive control and management of the train, the crew and the train men. The contract for transportation was not made by the deceased with the defendant, but with the Missouri Pacific Company. It was not for transportation over any portion of defendant's road, but from St. Louis to Webster over the Pacific road. If deceased had been a passenger from a point on defendant's road under a contract for transportation to St. Louis, or from St. Louis to a station on its own road, another question would arise which it is not necessary to consider in this case. We are not to be understood as deciding that the fact that deceased bought his ticket from the Missouri Pacific Company is conclusive against plaintiff's right to recover in this action, for as held by the Court of Appeals, if he was lawfully on defendant's train, and it was operated by servants under its control, it matters not of which company he purchased the ticket, the defendant would be liable for any injury received by him occasioned by the negligence of its employees.

The case therefore turns upon the construction of the contract between the two companies. Parol evidence was properly admitted to show the meaning of the phrases "train men" and "crew," as employed in the contract, and to show what are the duties of conductors and other train men; and aside from the parol testimony of those employees that they were in the employment of the Missouri Pacific Company, the admissibility of which is questionable, since that is a question to be determined by the written contract, in our opinion, by the terms of the contract the train men were in the employment and under the control of the Missouri Pacific Company while the train was passing over its road between St. Louis and the town of Pacific. This is so provided in express terms in the contract. The defendant was, by the agreement, to furnish free of all expense to the Missouri Pacific all the passenger and freight cars for the performance of its business between St. Louis and Pacific. It was no part of the defendant's business to carry passengers from St. Louis to any station between St. Louis and Pacific. It received no part of the money paid to the Missouri Pacific for carrying such passengers. It had no connection with the Missouri

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Pacific in that business, and that the latter company used defendant's cars and train men in the prosecution of such business did not create a liability on the part of defendant, the Missouri Pacific Company having reserved exclusive control of the train men and the train.

The fifth clause of the contract, by which defendant agreed to indemnify the Missouri Pacific Company "against all loss or liability" on account of "any accident or damage" received on the road "through the fault or negligence of the defendant or its agents or employees," giving it its broadest scope, does not alter the relation of the companies to passengers from St. Louis to any station between that and Pacific. If it be so construed that if the plaintiff in this case had sued the Missouri Pacific Company and recovered a judgment, the defendant would be liable to the Missouri Pacific, it is but a contract of indemnity, which of itself, cannot create a liability on the part of defendant to such a passenger. That by the agreement the Missouri Pacific Company was to pay no part of the wages of the train men who were to be furnished by defendant does not create a liability on the part of the defendant to a passenger from St. Louis to a station between that and Pacific, any more than an agreement between the Missouri Pacific Company and an individual, by which the latter should assume the payment of the train men on one of its trains, the company as in this contract reserving to itself the control of the train and train men, and the movements of the train, would render such individual liable for injuries received by one through the negligence of such employees.

Counsel for appellant cite *Kelly v. Mayor, etc.*, 11 N. Y. 432, and *Durst v. Burton*, 47 N. Y. 167, in support of the proposition that the train men were acting under the supervision of the Missouri Pacific Company; that fact would not make them agents of that company. *Kelly v. Mayor* is an authority against the plaintiff's claim here. There the city of New York had ordered a street to be graded, and contracted with an individual to do the work, and it was held that the city was not liable for damages caused by negligence of workmen employed by the contractor, notwithstanding by the terms of the contract the work was to be done under the direction and to the satisfaction of certain officers of the city. There the city employed another to do its work, reserving the right to have work done under its direction and to its satisfaction. Here the Missouri Pacific was doing its own work with absolute

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control of the agencies employed, responsible to no superior for the manner of doing it, and that it hired those agencies from, or that they were gratuitously furnished by another, cannot alter its relation to passengers or the public, or establish a relation between the passengers or the public, and the corporation or individual furnishing such agencies.

In *Durst v. Burton*, defendants represented an association owning a cheese factory, which they leased to one who contracted to manufacture cheese for them at an agreed price per pound, defendants reserving no right of supervision, but carrying on the business by furnishing the materials and taking and selling the product in the market as an article manufactured by them. And they were held liable for the fraud of their lessee in the manufacture of a lot of cheese sold by them. The difference between that and the case under consideration is too palpable to require more than a statement of the foregoing facts. The defendants there held themselves out to the world as the manufacturers of the cheese, sold it as such, and were of course liable in the action brought against them. No analogous facts are found in this record. By no act or transaction did defendant assume to carry passengers or freight from St. Louis to any point on the Missouri Pacific road. The principle invoked by appellant has application only where the party supervising a given work is acting, not as principal, but in subordination to another in whose service he is engaged.

One ground of negligence averred in the petition is the failure to light the depot at Webster, a matter in which defendant had no authority whatever, and we mention it only to show where the doctrine contended for by appellant would lead, for there is no question, if what appellant claims to be the law be conceded, that the defendant would be liable, if the only negligence alleged and proved as causing the injury to the deceased was the failure to have a light at the depot for the benefit of persons getting on or off the train. The Court of Appeals held that the Circuit Court erred in refusing an instruction asked by defendant, virtually withdrawing the case from the jury, and we are all agreed that the judgment of the Court of Appeals should be affirmed, except SHERWOOD, J., absent.

ON REHEARING.

HENRY, C. J. We adhere to the opinion heretofore delivered in this cause. It is pertinently asked if two persons sitting on the

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same seat in a car are injured in a railroad accident, can it be that one must look to one company and his companion to a different company for redress? Why not? In the case at bar the defendant company did not undertake to carry passengers from St. Louis or Pacific to points between those stations. It received no part of the money paid to the Missouri Pacific Railway Company by such passengers. The train was not under its control or management, but under that of the Missouri Pacific. If the general manager of the defendant had ordered the conductor of the train in question not to receive such passengers, and one had entered the car, having a ticket from the Missouri Pacific Company, and the conductor should have been in the act of expelling him from the train, could he have disobeyed an order from the manager of the Missouri Pacific to let the passenger remain? Was not the order from the latter to receive and carry such passengers one which he was bound to obey? A part of the rolling stock of the train was owned by the defendant. The locomotive was owned by the Missouri Pacific, which also owned the road. The train men, though in the permanent employment of the defendant, were while moving the train from St. Louis to Pacific under the exclusive control and management of the Missouri Pacific, and the engineer and firemen were in the permanent employment of the latter company. Not an order could the defendant company have given as to the running of that train between St. Louis and Pacific. Not a passenger was received by defendant company to be transported between those points. The deceased had purchased his ticket of the Missouri Pacific Railway Company.

There were no contractual relations between him and the defendant. The conductor would have subjected the Missouri Pacific to a suit for damages had he ejected the passenger from the train, and would himself have been liable to that company for any damages recovered by the passenger against the Missouri Pacific for such ejection. Could he have sued the St. Louis & San Francisco company for such ejection? That company had not undertaken to carry him. It was not doing any such business between St. Louis and Pacific, and clearly he would have had no cause of action against the defendant, but must have sought redress from the Missouri Pacific. Whether to a through passenger who had procured a passage from the defendant company, the latter would have been liable for injury sustained between St. Louis and Pacific in conse-

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quence of the negligence of those operating the train, is not a question in this cause, and it is proper to abstain from deciding that question until it is properly before us. Upon what principle the St. Louis & San Francisco Company can be held liable in this case I cannot conceive. It certainly would be an anomaly to hold one responsible for the acts of another, over whom he had no control. Such a principle obtains in no civil action between individuals, and no reason can be assigned why it should apply in suits against corporations.

On a critical examination of the cases relied upon to sustain this action it will be found, in such of them as are correctly decided, that there is so marked a distinction between them and this as makes them wholly inapplicable. In every one of them it will be found that the party held liable had some control over the negligent servants in the very work they were engaged in performing.

Judgment affirmed.

BLACK and NORTON, JJ., dissenting.

 DESKINS V. GOSE.

(85 Mo. 435.)

Schools — teacher's rules for conduct out of school.

A public school teacher may make a rule forbidding scholars from quarrelling and using profane language on their way home, and punish them for disobedience of it.

ACTION for assault. The opinion states the case. The plaintiff had judgment below.

R. A. Debolt, for appellant.

H. M. Harber, for respondent.

NORTON, J. This suit was brought to recover damages for alleged injuries inflicted by defendant on plaintiff in whipping him with a switch. The answer of defendant sets up that he was a teacher of a public school; that plaintiff was one of the pupils of said school, and that for a violation by plaintiff of a rule of the school, in using profane language, quarrelling and fighting with

the other scholars of the school, he did, in order to preserve good order and discipline in the school, and to promote its usefulness, chastise plaintiff with a switch, inflicting upon him reasonable and moderate punishment. Plaintiff obtained judgment for \$9, from which the defendant has appealed.

On the trial plaintiff offered evidence tending to show that the punishment inflicted was excessive; that plaintiff did not use profane language to, or quarrel or fight with the other scholars. The defendant offered evidence tending to prove the facts set up in his answer, and the following agreed statement of facts was then read to the jury, viz.:

“That the defendant was at the time the employed teacher of the public school at which the plaintiff was a regular daily attendant on and during the day that the acts and conduct complained of occurred, and for which the defendant chastised him; that the profane language used, the quarrelling and fighting was done, if at all, one-half or three-fourths of one mile from the school-house, after the school had been adjourned for the day, and the scholars were on their way to their respective homes, and before they had reached them, and the punishment was inflicted the next day thereafter, when the plaintiff returned to the school; that the defendant, as teacher, had a standing rule against the use of profane language, quarrelling or fighting among the scholars, either at the school-house or on their way home, and often spoke of the rule in the presence of the school and the plaintiff; that plaintiff was, at the time of the chastisement, thirteen years of age, and that all this occurred in the county of Grundy, Mo.”

The court then instructed the jury that under the evidence and pleadings the jury must find for the plaintiff, and refused to give several instructions asked by the defendant, to the effect that plaintiff, while in attendance as a scholar, was under the control of defendant as teacher, and that defendant had a right to punish him for an infraction of the rule put in evidence in the agreed statement of facts, and that the verdict of the jury should be for defendant unless they believed that the punishment inflicted was unreasonable or excessive.

It is this action of the court which is complained of as error, and we are of the opinion that the complaint is well founded. While it is provided in section 7045, Revised Statutes, that “the board shall have power to make all needful rules and regulations for the

government of the school in their district," if they failed to do so, the right of the teacher employed to conduct the school to adopt reasonable rules to promote good order and discipline, arises out of the very nature of his employment, and the only question worthy of consideration which this record presents is, was the rule which forbade the use of profane language, quarrelling and fighting among the scholars, either at school or on their way home, reasonable and promotive of good order and proper discipline of the school? It must be conceded without question that the rule, in so far as it forbade such acts on the part of the scholars while at school, was not only reasonable, but necessary to the orderly conduct of the school. But it may be insisted, and doubtless was urged before the trial court, that so soon as the scholars were dismissed from school by the teacher, his authority over them ceases, and that of the parent is resumed, and that therefore that portion of the rule which forbids such acts as are therein mentioned, while the scholars are on their way to their homes, is without sanction or authority. We are unwilling to go to this extent, believing it to be unsupported either by reason or weight of authority.

In the case of *Dritt v. Snodgrass*, 66 Mo. 286; s. c., 27 Am. Rep. 343, this court went to the extent of saying that when the pupil of a public school is released and sent back to his home, neither the teacher nor directors had any authority to follow him to his home and govern his conduct while under the parental eye. This court also in the case of *King v. Jefferson City School District*, 71 Mo. 628; s. c., 39 Am. Rep. 499, sustained the validity of a rule that provides that "any pupil absent six half days in four consecutive weeks, without satisfactory excuse, shall be suspended from school." In that case a pupil had played truant, and thereby became amenable to the operation of the rule, and was expelled, and this court refused to interfere, on the ground that the rule was a reasonable one. Truancy is an act committed out of the school-room, but being subversive of the good order and discipline of the school, may subject, as it did the scholar in this case, to suspension or expulsion. If the effect of acts done out of the school-room while the pupils are returning to their homes, and before parental control is resumed, reach within the school-room, and are detrimental to good order and the best interests of the school, no good reason is perceived why such acts may not be forbidden, and punishment inflicted on those who commit them. *Burdick v. Babcock*,

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31 Iowa, 562-7; *Lander v. Seaver*, 32 Vt. 114; *Sherman v. Inhabitants of Charlestown*, 8 Cush. 160.

The effects of the scholars using to and with each other obscene and profane language, quarrelling and fighting among themselves on the way to their homes, would necessarily be felt in the school-room, engender hostile feelings between scholars, arraying one against the other, as well as the parents of each, and destroying that harmony and good will which should always exist among the scholars who are daily brought in contact with each other in the school-room.

For the error committed in giving the plaintiff the first and second instructions, and refusing those asked by the defendant, numbered two, three, four, five and seven, the judgment will be reversed and the cause remanded.

Judgment reversed and cause remanded.

All concur.

SHEPARD V. MISSOURI PACIFIC RAILWAY COMPANY.

(25 Mo. 633.)

Evidence — personal examination of party.

In an action for personal injuries, the court at the trial may in its discretion refuse to compel the plaintiff to submit to a surgical examination.*

ACTION for personal injuries. The opinion states the case. The plaintiff had judgment below.

H. S. Priest with *T. J. Portis*, for appellant.

Leonard Wilcox, for respondent.

HENRY, C. J. Plaintiff sued defendant to recover for personal injuries sustained by her, occasioned by a collision of a train of defendant's cars, in which she was a passenger, with another train. On the trial she had a judgment for \$4,000, from which this appeal is prosecuted.

But two errors are assigned which are here relied upon by appellant: First, that the court erred in granting the order to examine

* See *White v. Milwaukee City Ry. Co.* (61 Wis. 536), 50 Am. Rep. 154, and note, 156.

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Dr. Staples upon interrogatories. Second. In refusing to order plaintiff to submit herself to an examination by competent and fit physicians and surgeons.

[Omitting the first point.]

There is a conflict between the authorities as to the right to compel a party to submit to any bodily examination. The authorities on this subject are cited in *Hatfield v. St. Paul & Dakota R. Co.*, 18 Am. and Eng. Railr. Cas. 292, and in a note by the editor. In *Loyd v. Railroad*, 53 Mo. 515, this court, Judge NAPTON delivering the opinion, said: "The proposal to the court to call in two surgeons, and have the plaintiff examined during the progress of the trial, as to the extent of her injuries, is unknown to our practice, and to the law. There was abundant evidence on this subject, on both sides, and any opinion of physicians or surgeons, at that time, would have only been cumulative evidence, at best, and the court had no power to enforce such an order." The reasons assigned in that case for refusing the order were probably sufficient, but we are not prepared to say, that in no case can such an order be made. Certainly if the court can make the order, it will have no difficulty in enforcing it. Not that it can compel the party to submit to a personal examination, but it may dismiss a plaintiff's suit for a persistent refusal to do so; or in case of either defendant or plaintiff, treat it as a suppression of testimony, and so present the matter to the jury as to make the refusal equivalent to proof of the fact, which the party asking such personal examination would make it probable, by affidavit or otherwise, the examination would disclose.

There are respectable authorities which hold that the court may order such personal examination. There are others to the contrary. We are inclined to hold with the former, but not that a party has an absolute right to have such a personal examination. It is a matter in which the court has a discretion which will not be interfered with unless manifestly abused. The case at bar is a fair sample of those in which it may and should be refused. The order asked by defendant was unreasonable in that it asked that this lady should submit to a personal examination, not by one skilled surgeon, but by at least three. It is with reluctance, and only from absolute necessity, that a lady of refinement ever submits to such a personal examination, even by her chosen physician, as defendant asked that this plaintiff should submit to. She had once submitted to

such an examination by Dr. Jackson, and again offered to submit to an examination by an eminent and reputable surgeon and physician of the city of St. Louis, where the cause was pending, but this did not satisfy the defendant, who proposed to summon a number of physicians and surgeons to participate in the examination. If, and we have no reason to doubt it, plaintiff is a lady of refinement, she would rather have given up the cause, and dismissed her suit, than to have submitted to what the defendant proposed.

We think that her offer was a fair one, and that asked by defendant unreasonable. Defendant did not object to Dr. Bauduy, that he was not competent to make the examination proposed, or that he was biased or prejudiced against the defendant, but so far as appears from the record, declined her offer, without stating any reason whatever for rejecting it. The judgment is affirmed.

All concur.

Judgment affirmed.

TOBIN V. BASS.

(35 Mo. 354.)

Deed — delivery — presumption from recording.

Where a father voluntarily executes and records a deed to his minor son, this is a *prima facie* delivery and acceptance, although there is no manual delivery and he retains possession of the deed.*

ACTION to cancel a deed. The opinion states the case. The plaintiff had judgment below.

Higbee & Raley, for appellant.

Shelton & Dysart and *C. C. Fogle*, for respondent.

NORTON, J. This suit was brought to cancel a deed executed by plaintiff and her husband to the defendants, for the purpose of removing a cloud upon plaintiff's title. Plaintiff obtained judgment, from which the defendants have appealed. Since the rendition of the judgment plaintiff died, leaving a will, and the cause has been revived in the name of James L. Baker, executor. The

* See *Union Mut. Ins. Co. v. Campbell* (95 Ill. 267), 35 Am. Rep. 186.

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following facts appear in the record before us, viz., that George Tobin, who was the husband of plaintiff, in 1845, entered eighty acres of land in Schuyler county, in his own name, and one hundred and sixty acres in the name of his wife. The evidence tends to show that this land was entered by Tobin with money which his father, who died in Kentucky, had willed to Tobin's children. On the 24th of August, 1849, Tobin and wife executed a deed conveying the said two hundred and forty acres of land to their children, six in number, four of whom were minors, one of unsound mind, and another being married, and all of whom lived with their parents on the land, except the married daughter, who lived about twelve miles distant. The consideration named in the deed was \$5, and natural love and affection. The deed was duly acknowledged before the Circuit clerk, filed for record, and duly recorded. After the deed was recorded Tobin took it to his house, where it remained with his other papers till his death, which occurred in 1878, and being then discovered, Mrs. Tobin, the plaintiff, destroyed it by burning it up. Alvra, the oldest child, and of unsound mind, and Melvina, another of the children, have always lived with their parents on the land.

After the execution and recording of the deed, Tobin and wife lived upon the land as before, exercising acts of ownership over it, receiving the beneficial use of it, and paying the taxes upon it. Ellen, one of the children, married John Haney in 1856, and Tobin and wife told him on the day of the marriage that he had made forty acres of land that day. This witness testified that after the war, by direction of Tobin and wife, he selected forty acres of the land, improved it and lived on it till 1881, when he left it to avoid trouble. Trabur, who married Josephine, another daughter, joined her in conveying one-sixth interest in the land, in October, 1854, to said Tobin, and in 1856, plaintiff joined her husband in a deed re-conveying the same back to Josephine, Tobin saying to Mrs. Tobin, after the deed was made, "that it was all fixed now; Josephine stands like all the rest of the children." Plaintiff, who at the time of the trial was about eighty years old, testified that she did not execute the deed to Josephine in 1856, nor the deed to the children in 1849.

There was no actual manual delivery of the deed, acknowledged and recorded in 1849, and in consequence of the failure of the clerk to index the deed, the fact that it was recorded was unknown

till about six months after the destruction of the deed by plaintiff, when it was discovered by Mr. Graves, to whom she proposed to sell the hundred and sixty acres which had been entered in her name. There was evidence tending to show that Mrs. Tobin always claimed this land, and also evidence that Tobin spoke of it repeatedly as land belonging to the children, and also evidence tending to show that the children understood the land to be theirs, although there is nothing to show, outside of this common understanding, that they had knowledge of the deed, till after the death of their father. The Circuit Court found that the deed of 1849 was duly acknowledged, filed for record and recorded, but held that it had never been delivered. So that the decisive question on the facts disclosed, is whether there was such delivery as to pass the title.

While the delivery of a deed is necessary to make it effectual in passing title, it is established by the following authorities, that when a deed to a minor child is absolute in form and beneficial in effect, and the father and grantor voluntarily causes the same to be recorded, acceptance by the grantee will be presumed, and such facts constitute, *prima facie*, a delivery, and affords reasonable presumption that the grantor intended to part with the title, and that clear proof should be made where a person who under such circumstances has executed, acknowledged and caused a deed to be recorded, before the court would be warranted in declaring that he did not intend to part with his title. *Cecil v. Beaver*, 28 Iowa, 242; *Robinson v. Gould*, 26 Iowa, 89; 3 Wash. Real Prop. (3d ed.) 261; *Masterson v. Cheek*, 23 Ill. 72; *Mitchell v. Ryan*, 3 Ohio St. 377. We are of the opinion that the plaintiff has failed to make such proof as would authorize us to declare that it was not the intention of the grantors to part with their title in the land conveyed to the defendant.

At the time the deed was made and put upon record four of the grantees were minors, one of unsound mind, and another married, living with her husband, some distance from the grantors. Although Mrs. Tobin testified that her husband gave her \$200, with which he entered the land in her name, it appears from her own evidence that the money thus bestowed upon her was not her husband's, but money of the children, which came from their grandfather in Kentucky. It was therefore but an act of justice due from the father and mother to convey the land thus entered to

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their children, the equitable owners, and we attach but little importance to the fact, that under these circumstances the possession of the deed was retained by the father after it was recorded. *Payne v. Twyman*, 68 Mo. 339. It has been held by respectable courts that under such circumstances the father, as to his subsequent possession of the deed, is the mere custodian for the child. *Masterson v. Cheek*, 24 Ill. 77.

These facts, in connection with the further fact that Tobin accepted a conveyance in 1854 of the one-sixth interest in this land from one of his daughters, a grantee in the deed of 1849, and in 1856, in conjunction with plaintiff, re-conveyed the land to the daughter, and the further fact which the evidence of witnesses Tobin, Morris, Bass and Haney tended to establish, that the children understood that the land was theirs, and that the father repeatedly said in the presence of plaintiff that the land belonged to the children, and the refusal of Tobin and wife to sell Trabur one forty acres of this land, and Morris another forty acres in 1866, putting their refusal on the ground that the title was in the children, the *prima facie* case arising from recording the deed is so strengthened as not to be overcome by the fact that Tobin remained in possession of the deed and land, enjoying its profits, exercising acts of ownership over it till his death in 1878.

For the reasons given the judgment will be reversed and the bill dismissed.

All concur.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

HAMILTON V. PEOPLE.

(113 Ill. 34.)

Criminal law — act of one as act of all.

Three persons entered the premises of another with intent to steal, and being discovered by the owner, one of them struck him, and another shot at him with a pistol. *Held*, that all were guilty of assault with intent to murder.

CONVICTION of assault with intent to murder. The opinion states the case.

Morris & Boyer, for plaintiff in error.

W. V. Choisser, for people.

MULKEY, J. At the September term, 1883, of the Saline Circuit Court, William Hamilton, Hat Mitchell and William Eaton were jointly indicted for an assault upon Samuel Parks, with intent to murder. At the March term, 1884, of the court, Hamilton and Mitchell were alone put upon trial, which resulted in their conviction, the jury fixing the term of their confinement in the penitentiary at two years, and the court sentenced them accordingly. The accused have brought the record here for review, and ask a reversal of the conviction mainly on the ground it is not sustained by the evidence.

Hamilton v. People.

The difficulty out of which the present prosecution arose occurred on the farm of Samuel Parks, between eight and ten o'clock of the night of September 1, 1883. The account given by Parks of the affair is in substance as follows: "For two nights previous to the difficulty some one had been in my water-melon patch. I went down to the orchard and melon patch between eight and ten o'clock. My son Samuel went with me, and took a shot gun. We located about ten steps apart. Soon we heard some one coming. It was Hamilton, Mitchell and Eaton. After they had crossed the fence and started in the patch, one of them said, 'the biggest ones are down this way.' Mitchell came toward me, and Hamilton and Eaton went toward the boy. He halted them. Mitchell ran. Eaton called him a damned coward, and called him back, saying, 'there's only a man and a boy — let's get what we came after.' I invited them to go to the house with me and eat water-melons, but they refused. Eaton told the boy not to shoot, and was rushing toward him. I told them the boy would not shoot — that he was nothing but a boy, and not to hurt him. Hamilton said that Eaton was nothing but a boy either, and to let them fight. I started to the boy. Eaton ran up to him and knocked him down, and Hamilton caught me around the arms and threw me down. Eaton took the gun away from the boy. Hamilton fell on top of me. I turned him, and think I struck him. I was a-straddle of him. He hit me in the face and on the head with something hard. I do not know what it was. My wife now came up with a hoe. Eaton knocked her down while I was engaged with Hamilton. I saw him chuck her head upon the ground. I heard Mitchell ask Hamilton if he was on top. * * * I felt something hard on my breast. I found it was a stone, which Mitchell, I thought, was giving to Hamilton. I took it out of his hands, and hit Hamilton three blows, and broke him loose from me, and as I was raising up, Eaton shot at me with a pistol. The powder burnt my face. * * * As we got up, Mitchell hit me on the head with a hoe. I did not know any thing after that time."

Such is the general outline of the affair as given by Parks, and while there are some slight discrepancies between him and his son in their statements of the facts, yet under the circumstances there is nothing in them inconsistent with good faith and an honest purpose to tell the truth. In the darkness of the night the witness may have been mistaken as to some of the details, yet after making

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ample allowances for this, and giving the accused the full benefit of all doubts, we are of opinion there is still sufficient evidence to warrant the conviction. The fact is undisputed that the three defendants, one of whom was armed with a pistol, invaded the premises of the prosecuting witness with a criminal purpose. The business upon which the parties had deliberately entered was a hazardous one. They had a right to expect that in the event they were detected in stealing the melons, it would result in violence endangering life or limb—as it actually turned out afterward. That they were all co-conspirators in a dangerous criminal enterprise is an undisputed fact. Such being the case, whatever was done by one, in contemplation of law was done by all, and all are therefore equally responsible.

[Omitting other points.]

Judgment affirmed.

BOWEN V. ALLEN.

(113 Ill. 53.)

Will—misdescription—application.

A testator devised a "house and lot in Patoka, Illinois," describing it as "the north two-thirds part of lot No. 19 in block 10." At the time of executing the will she owned that part lot and lot 12 in the same block, but at the time of her death she owned only lot 12. In the absence of evidence that she owned a house on lot 19 at the time of the execution, *held*, that the description would not justify a recovery of lot 12.

EJECTMENT. The opinion states the case. The plaintiff had judgment below.

Casey & Dwight, for appellant.

Henry C. Goodnow, for appellee.

WALKER, J. Robert E. Allen, appellee, brought an action of ejectment against George W. Bowen and Nancy Hall, appellants, to recover the north two-thirds of lot 12, block 10, railroad addition to the town of Patoka, Illinois. The general issue and other pleas were filed, and issue joined. A jury was waived, and a trial had by the court, by consent of the parties. The court found the

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issues for the plaintiff, and rendered a judgment of recovery in his favor, and defendants appeal and urge a rehearsal.

On the trial plaintiff introduced and read in evidence the last will and testament of Ann Quinn, made and published on the 14th day of January, 1870, and filed in the County Court of Marion county on the 18th day of July, 1881. The provision of the will relied on by plaintiff as establishing his title, reads:

"*First.* I give and bequeath to my grandson, Robert E. Allen, of Clinton, Indiana, my house and lot in the town of Patoka, Illinois, known and described as follows: The north two-thirds part of lot No. 12, block No. 10, railroad addition to the town of Patoka, Illinois."

Testatrix died in the year 1876. No will having been produced and probated after her death, about the 12th of May, 1881, two of her heirs, a daughter and the only child of another daughter, deceased, sold and conveyed their interest in the property to defendant Nancy Hall, who took and still holds possession of the premises under that conveyance. Testatrix, after making the will, intermarried with one Pearson, on the 18th day of October, 1872, who died previous to her death, leaving her a widow. The property described in this clause of the will was all the real estate she owned in the town of Patoka at the time of her death, and she owned it at the time of making the will. These facts are admitted by stipulation by the parties. On the 18th day of July, 1881, on proof, the Probate Court of Marion county admitted the will to probate. Contestants appealed the case to the Circuit Court of Marion county, where the probate by the County Court was affirmed, except it was found in the clause in reference to this land, that the lot was first described as lot 19, but has been altered to read "lot 12," and it was ordered that it should stand and be read as lot 19.

[Minor points omitted.]

The will, as it was probated and corrected, describes the lot as No. 19, and the recovery is for lot 12. The stipulation admits that testatrix, at the time she published the will, owned this property and lot 12, and that she owned no other property in the town of Patoka at the time of her death. When there is from the entire description, ambiguity and doubt as to the identity of the property, courts have uniformly held that any contradictory or useless portion of the description may be disregarded so as to render the description certain and complete. Usually, if not

uniformly, the conveyance first designates the property by a general description as to the county, State and township in which it is located, and generally this is followed by a particular description, in States where there are government surveys, by the section, and the particular portion of the section or by metes and bounds of a portion of the section. Or the description may be general, as the house or residence of the grantor in a designated county, city or village or a particular addition thereto. In this case we find the premises described as "my house and lot in the town of Patoka, Illinois." Had this general description been all, no one would have doubted the sufficiency of the description. On finding a house and lot belonging to testatrix in that town, no one would have questioned that they were the property devised. Such a description, although general, has always been held sufficient. But this goes further, and gives a more particular, minute and detailed description. It adds to the general description: "Known and described as follows: The north two-thirds part of lot No. 19, block No. 10, railroad addition to the town of Patoka, Illinois." There is no pretense that the lot in controversy does not fill every description of this lot, general and specific, except the lot in dispute is lot 12, and the will describes a house and part of lot 19. In the absence of evidence whether testatrix owned a house on lot 19, or not, when the will was published, which number shall we adopt as the lot intended to be devised? It is admitted she owned this property when she executed the will, and that she owned no other real property in the town at the time of her death. In the absence of proof, shall we presume that testatrix owned any property other than that admitted in the stipulation to have belonged to her, both at the time she published her will and at her death? That admission does not negative the fact that she did not own two-thirds of lot 19. She, in the devise, says she owns the north two-thirds of lot 19, and there is no evidence proving that she did not, or to warrant a rejection of the number of the lot as repugnant to the other portion of the specific as well as the general description. As probated, "No. 12" was stricken out, and "No. 19" was restored, as the will was first written, and we must receive and act on the will as it is probated. We have no power to adopt "No. 12" instead of "No. 19," in the absence of all evidence. We are precluded from inferring that she had no title or claim to the north two-thirds of the latter named lot. We must therefore follow the description of the will, in the absence of evidence.

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It is a rule of law that has never been departed from in this court, that extrinsic evidence cannot be heard to alter, detract from or add any thing to the provisions of a will. *Kurtz v. Hibner*, 55 Ill. 514; s. c., 8 Am. Rep. 665. But this case is not like that. There the land was situated, as described in the will, in one section, and it was proposed to prove that it was in fact in a different section. There the naming of the section was essential and controlling, because no other controlling description was adopted. Had it described the property as his farm in the township and he had held no other in the township, then a different result would have been reached because there would have been a sufficient description to manifest the testator's intention, after the description by the section had been rejected. Had the section not been named or had it been rejected in that case, there would have been nothing to point out or indicate the precise land intended to be devised. But in this case, reject all reference to the lot on which the house was situated, and still the description is complete and amply sufficient to manifest the intention of the testatrix, and to identify the premises devised. Her house and lot are the subjects of the devise, and Robert E. Allen is named as the devisee. But it is necessary, to effectuate that clear intention, that we shall ascertain the particular house she intended to devise. She, for the purpose of designating it with more certainty, says it is in the town of Patoka, and in the railroad addition to the town. If the proof shall show that she, at the time of making her will, had no other house in that addition to the town, then the house in controversy is identified as the house devised. If however it should appear that she had a house on the north two-thirds of lot 19, then that house and the two-thirds of the lot are the property devised. We have discussed this question because the case will have to be presented again for another trial, when this question will no doubt be presented for decision.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

DIGBY V. PEOPLE.

(113 Ill. 122.)

Criminal law — dying declarations.

A person mortally wounded in an encounter stated that the defendant shot him. He had not been informed that his wound was mortal, but had said he should not live three days. He made no preparation for death, used profane language and spoke of resuming business and being married. *Held*, that his statement was not competent as a dying declaration.

CONVICTION of murder. The opinion states the case.

T. B. Stelle, for plaintiff in error:

CRAIG, J. This was an indictment for murder. It was claimed on behalf of the people that in the night of October 18, 1878, Henry T. Digby, the plaintiff in error, attempted to rob one John Sinclair, who was sleeping in a room at the house of John Digby; and that while engaged in the effort to commit the robbery, plaintiff in error shot and mortally wounded Sinclair, who in a few days thereafter, died from the effects of the wound received. At the September term, 1879, of the Circuit Court of Hamilton county, the plaintiff in error was tried and found guilty, and his term of imprisonment was fixed, in the penitentiary, at fourteen years, by the jury. The court overruled a motion for a new trial, and rendered judgment on the verdict. To reverse the judgment, this writ of error was sued out, September 30, 1884.

Upon an examination of the evidence introduced by the people to establish the guilt of the defendant, we find no evidence in the record which can be regarded as sufficient to sustain the verdict of the jury, aside from the declarations of Sinclair, made in the presence and hearing of Dr. Bullard. It therefore becomes an important question whether those declarations were proper and legal evidence for the consideration of the jury in passing upon the guilt or innocence of the defendant.

Dr. Bullard, who was called as a witness for the people, over the objection of the defendant, testified to the declaration of the deceased, as follows: "I saw deceased twice after he was shot. On Saturday afternoon, after he was shot, I saw him. He knew me.

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I asked him if he had any idea who shot him, and he said, 'the man who shot me wears a pair of shop-made boots.' I said I hoped it was not a fatal shot, and tried to encourage him. He made no reply. Again, on Monday, about two or three o'clock in the afternoon, I saw deceased. He knew me. He said he felt mighty bad. I told him I hoped it was not a fatal shot, and that I hoped he would get well. He said, 'no; I'll not live three days.' I asked him if he knew who shot him. He said he did—that it was Henry Digby. He gave no reason for thinking it was Henry Digby. He spoke fluently."

As a general rule hearsay evidence is not admissible, but an exception to the general rule is found in case of dying declarations, on the trial of a defendant on an indictment of this character. Before the court admitted the declarations, evidence was heard by the court for the purpose of ascertaining whether such declarations could be regarded as the dying declarations of Sinclair. From this evidence it nowhere appears that Sinclair had ever been advised by his physicians, or by any other person, that his wound was mortal, and that he could not recover. Nor does the evidence, when fairly considered, establish the fact that Sinclair believed he would not recover. It is true that some of the witnesses state that he said he could not get well, but others who were with him constantly testify the other way. Richard Sinclair, who was called on behalf of the people, testified: "I was with him nearly all the time. I never heard him express himself about living or dying. We were in business together. He never talked about any disposition of his property or business." Blades, who testified for the people, said Sinclair "swore about being waked up. He never said any thing about business, religion or dying." Elizabeth Merrill testified: "I was with deceased every day after he was shot, until he died. He was anxious about his medicines, and wanted to take them regularly. He said several times he wished he knew the God damned man that shot him. He asked Eliza when she and her mother were going to town to get her things. He told me on Tuesday night that he would be able for he and Eliza to get married by next Sunday. He said he was better. He said Tuesday night he would give \$100 or \$50 to know the damned man who shot him. He always told me he was getting better until Tuesday night." Sarah Downing, called for defendant, testified: "I saw deceased on Tuesday before he died. I asked him how he was. He

said if he kept on getting better he would start the factory on next Monday." Eliza Digby, also for defendant, testified: "I am the sister of defendant, and was with deceased nearly all the time after he was shot. Deceased and I were engaged to be married, and he wanted to know when I was going to town to get my clothes to be married in. He told me several times he was better. I heard him swear. He said, 'God damn it.' I waited on him and nursed him." On cross-examination this witness stated "deceased said he thought he would get up by next Sunday." Several witnesses also testified to repeated acts of swearing by Sinclair during his illness, but a statement of the language used will serve no useful purpose here.

When due weight is given to all the evidence introduced before the court, does the testimony of Dr. Bullard fall within what is known in law as dying declarations? It is said in 1 Greenleaf on Evidence, section 156: "The general principle on which this species of evidence is admitted was stated by Lord Chief Baron EYRE to be this: That they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." In *Starkey v. People*, 17 Ill. 17, this court, in considering this class of evidence, said: "Dying declarations are therefore such as are made by the party, relating to the facts of the injury of which he afterward dies, under the fixed belief and moral conviction that his death is impending, and certain to follow almost immediately, without opportunity for repentance, and in the absence of all hope of avoidance — when he has despaired of life, and looks to death as inevitable and at hand."

Were the declarations in question made in extremity? Was deceased at the point of death, and all hope of life gone, and death expected to follow at once? The record discloses no such case. It is true that the deceased stated that he would not live three days; but this, when considered in connection with the other evidence on the subject, is not enough to bring the evidence within the rule laid down in the authorities heretofore cited. Again, the physicians who were attending the deceased had never informed him that his wound was a dangerous one, and likely to produce death,

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nor had his friends so advised him. Nor had the deceased made any preparation for death, spiritually or otherwise, as he probably would have done had he supposed death was near at hand. He, as appears, was in business, and had property, but he made no effort whatever to settle his business affairs or make disposition of his property, as he probably would have done had he anticipated that his life was about to terminate. On the other hand, he talked of his business as a man would who expected soon to be able to take charge of his affairs again. In view of these facts, which were before the court when the evidence was offered, we are of opinion that it cannot be regarded as the dying declarations of the deceased.

It will be remembered that evidence known as dying declarations is hearsay in its character. The accused has not the right to meet the witness who accuses him, face to face. He is deprived of the right of cross-examination—one of the greatest tests of truth in the trial of a crime. The evidence is not given under the sanctity of an oath. But while these safeguards, which are thrown around ordinary evidence for the purpose of preventing falsehood, cannot be applied to dying declarations, still there is one element—one check—which cannot be dispensed with, and that is that the declarations, as declared in *Starkey v. People*, must be made in view of impending death, and under the sanction of a moral sense of certain and just retribution. The declarations read in evidence were not made under such circumstances, and we do not think they were admissible in evidence against the defendant.

The judgment of the Circuit Court will be reversed, and the cause remanded.

Judgment reversed.

LAUNTZ V. PEOPLE.

(113 Ill. 137.)

Municipal corporation — right of mayor to vote — tie.

Under a city charter giving the mayor the right to vote only in case of a tie, if four of the eight councilmen vote in the affirmative on the election of an officer, and the other four being present refuse to vote, the mayor may vote, and voting in the affirmative, the candidate will be elected.

QUO WARRANTO. The opinion states the case.

M. Millard and Geo. F. O'Melveny, for appellant.

A. S. Wilderman, R. A. Halbert and John B. Bowman, for appellee.

SHELDON, J. Defendant's appointment to the office is admitted by appellee's counsel. The filing of his oath of office is averred in the plea, and not traversed by the replication. It therefore stands confessed by the pleading, so that all there is remaining to give to defendant complete title to the office of city treasurer is the approval by the city council of his official bond.

There were eight members in the body of the city council; a quorum consisted of five members; the mayor had a casting vote in case of a tie. On the 21st and 29th of May, the council being duly convened, and all its members present, a motion was made to approve defendant's bond, and one-half of the aldermen (four) and the mayor voted to approve the bond, and the other half refused to vote. This action of the city council, it is claimed by appellant, was a valid approval of the bond. On the other hand, it is contended that a majority of the aldermen present (five) should have voted in its favor, to make a valid approval of the bond. In respect of the election of corporate officers, the well-settled rule is, as stated in *Wilcox on Corporation*, § 546: "After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting, because their presence suffices to constitute the elective body; and if they neglect to vote, it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote; and such an election is valid though the majority of those whose presence is necessary to the assembly protest against any election at that time, or even the election of the individual who has the majority of votes." And see *Angell & Ames on Corporations*, §§ 126, 127; *Rex v. Foxcroft*, 2 Burr. 1017; *Commonwealth v. Read*, 2 Ashm. 261; *State v. Green*, 37 Ohio St. 227. This doctrine is admitted by appellee's counsel, with respect to elections; but they claim that it is limited to cases of elections, and does not extend to the transaction of other corporate business—

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that in the latter case a majority of those present must vote for a proposition, to carry it. There is authority for this distinction. *Gosling v. Voley*, 4 H. L. Cas. 679.

It is further insisted that as the city charter directs the city council "to determine the rule of its proceedings in conformity with the usual practice of deliberative bodies," the parliamentary rule which is adopted by such bodies should obtain, and that that rule requires the vote of a quorum to transact business, and that where the roll is called, and the yeas and nays are taken, and it appears from the response to the call that no quorum is voting, business must be suspended till a quorum answers. We do not find it necessary here to pass upon these positions of appellee's counsel, for conceding their correctness, we think the admitted rule which applies in cases of elections should be taken to govern in this case of approval of the bond, as being a thing pertaining to the matter of the officer's appointment. The appointment and approval of the bond are both necessary to the investiture of the office. Both are to be the same body, and we think they may be looked upon as an entirety in investing any one with the office — that the approval of the bond is a step in the completely filling of the office of city treasurer by the city council, and thus is not other business, but the same business with that of the officer's appointment. What is the propriety of separating the proceeding, and requiring another mode of expressing the will of the council in the approving of the bond than in the choosing of the officer? We see not why, properly enough, the same rule may not be held to cover the whole proceeding, the making of the officer, and that the same vote in respect of number of members voting, which admittedly suffices in the case of the election of the officer by the city council, should be deemed sufficient for the approval of the officer's bond. This should be so, unless the authorities forbid. Where the members of the council are equally divided, four voting one way and four the other, there is a tie, and the mayor may vote with either side, and make a majority. What reason is there why, when all the eight members are present and four vote and four refuse to vote, the mayor should not vote with one side or the other, and make a majority? Why may it not be considered as equivalent to a tie, counting the members who do not vote as voting the contrary from the mayor? This would be fulfilling the purposes of the law in giving the mayor a casting vote in case of a tie. It would enable the mak-

ing of a majority, and prevent the obstruction of business by refusing to act, and would be giving effect to the will of the majority, which is the governing rule in the action of corporations. *Ang. & Ames Corp.*, § 499. What the propriety of giving to a refusal to vote more potency than to a vote cast? — of allowing a gain from violation of duty, in making the refusing to vote of more effect in governing the action of the body of which one is a member, than voting? The charter provision, that where the officer appointed fails to qualify within ten days after receiving notice of his appointment, the office shall be filled by a new appointment, did not render the appointment void on failing to qualify within the time; but such failure was but a cause of forfeiture of the office, which the city council might waive, and they did here waive it, in proceeding afterward in the approval of the bond. *Chicago v. Gage*, 95 Ill. 621; *Cawley v. People*, 95 Ill. 249.

It is said that all controverted questions of fact were finally settled by the judgment of the Appellate Court, and therefore the judgment of that court must be conclusive. It is true that under the practice act the re-examination of cases brought to this court is to be in respect of questions of law only, and that no assignment of error is to be considered which calls in question the determination of the court below upon controverted questions of fact in any case except as there provided. But in the present case there is no controverted question of fact. Appellee's counsel say, in their brief, "there is no controversy as to the facts, and that the only question in either the trial court or the Appellate Court was as to their legal effect." The question is, whether the uncontroverted facts sustain the defendant's plea of justification, which is a question of law only, and we answer it in the affirmative.

The judgment of the Appellate Court must be reversed and the cause remanded.

Judgment reversed.

MULKEY, J., dissented.

Wood v. Evans.

WOOD V. EVANS.

(113 Ill. 186.)

Contract — to make one an heir.

An agreement by one to take, maintain and educate an orphan girl, eleven years old, and for her services until she becomes eighteen, to leave her at his death a "child's part of his estate," is invalid.*

BILL for specific performance. The opinion states the case. The defendant had judgment below.

R. F. Wingate and J. B. Bowman, for appellant.

M. W. Weir and W. C. Kueffner, for appellee.

CRAIG, J. This was a bill in equity, brought by Sarah Woods, to enforce the specific performance of an alleged contract with one John Short, now deceased. A second amended bill was filed, to which a demurrer was sustained, and the complainant electing to stand by her bill, the court ordered the bill dismissed. The question for determination is the sufficiency of the bill.

It is alleged in the bill that on the 20th day of May, 1847, the complainant was an infant orphan, eleven years of age, and the inmate of a charitable institution in the city of St. Louis, and under the immediate charge of Sister Benedicta; that one John Short, who then was a married man, childless, but possessed of property of the value of about \$20,000, applied to the institution to take her into his service and employment; that thereupon, to-wit, on the 20th of May, 1847, at said city of St. Louis, at the special instance and request of said Short, and by and with the consent of said Sister Benedicta, and of her, the complainant, a contract, in writing was then and there entered into, by and between said Short and the complainant, and signed by him by his mark, and by said Sister Benedicta on the part of the complainant; that by the terms and stipulations of the contract it was understood and agreed by and between said Short and the complainant, in substance and to the effect that she, the complainant, should enter into the service of him, said Short, and with him live and continue to live from

* See *Wallace v. Long*, ante, p. 222.

thence to and until she should become eighteen years of age, and that for and during all that time she should well and faithfully serve and obey him, said Short, as a good and orderly servant and as a dutiful child should, in all respects, and in all such lawful business and employment as she should be put to do or perform by the direction or command of him, said Short; and that in consideration of the promises and undertakings so to be done, fulfilled and performed by the complainant, he, Short, undertook and faithfully promised the complainant to take her from said institution into his service, adopt her into his family, support, maintain, educate and instruct her in all the employments and business in which females were ordinarily occupied, and leave and give her, at his death, a child's part of his estate. The bill further alleged that the complainant performed the matters on her part to be kept, and that when Short died, in the year 1877, he left a large estate, of the value of about \$25,000, the bulk of which, after some minor bequests, he, by his last will and testament, devised to his sisters and niece. It is also alleged in the bill that the contract, when it was entered into, was placed in the hands of Short, for safe keeping, but that (the complainant believing, charged the fact to be) the contract has been lost or destroyed, and that she cannot produce it to the court, or make it a part of her bill. The complainant, among other things, prays that the estate, real, personal and mixed, that may remain after the payment of all claims allowed against it, and the said items of \$200 and \$100 to the priests, shall be decreed to and vested in her, and for such other and further relief in the premises as might seem fit, and to justice and equity appertain.

The specific performance of a contract, in equity, is not a matter of right in the party, but a matter of sound discretion in the court, which may grant or deny relief, as may appear equitable under all the facts and circumstances of the case. Story Eq. Jur., § 769. A contract which is not certain, and which is not fair and just in all its provisions will not be specifically enforced, by decree, in a court of equity. Story, in the section *supra*, says: "An agreement, to be entitled to be carried into specific performance, ought to be certain, fair and just in all its parts." It is also a well-settled doctrine, where an attempt is made to effect a distribution of property different from that provided by law, by a contract resting in parol, the evidence relied upon to establish such a

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contract is looked upon with jealousy, and should be weighed in the most scrupulous manner. *Wallace v. Rappleye*, 103 Ill. 229. Here the contract set up in the bill is nothing more than a verbal contract. It is alleged that the contract was reduced to writing, but it has been lost or destroyed. The contents of the agreement will have to be established by parol evidence, and it stands in no better light and occupies no better position than it would occupy if it had never been reduced to writing.

The contract set up and relied upon in the bill is very peculiar. By its terms and provisions, as set out in the bill, Short, who, at the time of making the contract, was worth about \$20,000, agreed to adopt complainant into his family, support, educate and instruct her in all the employments and business in which females were ordinarily occupied, and leave and give her, at his death, a child's part of his estate. The compensation which Short was to receive for what he undertook to do was seven years' service. Complainant was to serve him from the time she was eleven years of age until she arrived at the age of eighteen years. While it may be true that the services agreed to be rendered might be regarded as a sufficient consideration to support an agreement to make one an heir, or to bestow upon such a person a certain share of an estate, yet it is apparent that the services agreed to be rendered here could in no just sense be regarded as an equivalent for the property agreed to be given. On the other hand, it is plain to any person of ordinary intelligence that the support and education would fully compensate complainant for all the services agreed to be rendered; but notwithstanding this, if a specific performance of the contract set out in the bill should be decreed, she will receive, in addition to what she has already received, quite a large fortune. Under such circumstances, can the contract be regarded as fair and just in all its parts?

In the Circuit Court it was held that the clause of the agreement that Short would leave and give complainant at his death a child's part of his estate, taken in connection with the other provisions of the agreement, merely required him to adopt the complainant as a child, and that after his death she would have the same rights that a child would have had if he had died leaving children. If this is the proper construction to be placed on the agreement, complainant would not be entitled to any portion of Short's estate, as a person always has the right to dispose of property by will, regardless of

the claims of children. It will not however be necessary here to determine whether or not this is the proper construction to be placed on the agreement. If the language employed leaves the intention of the parties who executed the contract in doubt, or if there is uncertainty in regard to what was intended, a court of equity will not undertake to decree a specific performance. In speaking upon this subject, Story (§ 767) says: "If they (the contracts) are not certain in themselves, so as to enable the court to arrive at the clear result of what all the terms are, the will will not be specifically enforced. It would be inequitable to carry a contract into effect where the court is left to ascertain the intentions of the parties by mere conjecture or guess, for it might be guilty of decreeing precisely what the parties never did intend or contemplate." In *Wallace v. Rappleye*, 103 Ill. 249, where a bill was filed by an illegitimate child to enforce an agreement made by the father to make the child an heir, it was held that the uncertainty of a contract to make one an heir, as to the amount of property to be affected, is a circumstance to be considered by the court. It is there said: "The only significance of a contract to make one an heir is in securing a right to property. But what is the amount of property involved in such a contract? How much interest will be left to be inherited? Such a contract existing, suppose Wallace in his life-time had given away his property, or made a will of it to his two lawful children, or others, would that have consisted with the right under the contract? And if not, how much of this property might he have given away or devised away, and how much must he have retained to satisfy the contract? The contract would be uncertain as to the amount of property reached by it. This is a circumstance to be considered in the exercise of the discretion of the court as to decreeing specific execution."

If a contract to make one an heir is to be regarded uncertain, it seems plain that a contract or a promise to give a child's part of an estate to a person must, upon the same principle, be held to be uncertain. What is a child's part of an estate? Is a child's part one-tenth, one-fifth or one-third of the property belonging to a person at the time of his death? What share a child may be entitled to receive after the death of a father will always depend upon a variety of circumstances. If a man dies intestate, leaving ten children, a child's part of the estate would be one-tenth, after the payment of all debts. If five children were left, a child's part

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would be one-fifth of the estate. Should there be a widow left surviving the decedent, she would be entitled to one-third of the personal estate, absolutely in her own right, and one-third of the lands during her natural life. A child's part would, in such a case, be materially affected by the fact whether or not a widow survived. Again, should the property be disposed of by will, duly executed as provided by law, to some charitable institution or to a college, there would be no child's part for distribution. It seems plain that the amount of property which may be embraced under the term "child's part," is quite indefinite and uncertain. A child's part may be nothing, or it might be more or less, always depending upon various circumstances. At the time the agreement set out in the bill was made, what portion of Short's property was complainant entitled to receive, under the contract? Was it one-third, a fourth, a fifth or a tenth? The answer is obvious. The contract is so uncertain that it is impossible to determine what amount of property, or what part of Short's property, the contracting parties intended should pass to complainant under it. Under such circumstances, the specific performance of the contract cannot be enforced in a court of equity.

There is another serious objection to the enforcement of the contract in a court of equity. Its enforcement would work great injustice to the wife and lawful heirs of Short. At the time the agreement was made, Short had a wife, but no children, and upon his death, under our laws, after the payment of debts, his wife would be entitled to all his personal estate and one-half of his real estate. The right of the wife could not be cut off by any will Short might make — and yet if this contract is to be enforced, the wife would be deprived of inheriting as an heir of the husband, and would be compelled to accept merely dower in her husband's estate. This would be oppressive, and manifestly unjust to the wife. It is true in this case the wife died before the husband; but that does not change the principle involved. It is enough that the enforcement of a contract of this character may be productive of injustice to others. When such results are to follow, it ought not to be enforced in a court of conscience.

Other questions have been raised, but it will not be necessary to consider them here.

After a careful consideration of the whole record, we think the decision of the Appellate Court correct, and it will be affirmed.

Judgment affirmed.

PEARCE V. FOOT.

(113 Ill. 222.)

Contract — gambling — "options" — "winner."

Option dealings in grain, where no property passes or is expected by either party to pass, are void as gambling contracts, and money paid thereon may be recovered under the statute, from the broker of the party as the "winner."^{*}

TROVER for a promissory note. The opinion states the point. The plaintiff had judgment below.

Dent & Black, and Lyman & Jackson, for appellant.

Emery A. Storrs, for appellee.

SCOTT, J. This case is one of more than usual importance, on account of the sum involved, which is quite considerable, and on account of the principles involved in the decision. There can be no controversy in this court concerning the facts. They must be regarded as having been settled by the finding and judgment of the trial and Appellate Courts. This much is frankly conceded by counsel, and the position is taken, if the case shall now be considered as on a demurrer to evidence — that is, conceding the truth of all the evidence tends to establish in favor of plaintiff — the facts do not establish in law a right to recover. The defendant does not claim he is an assignee of the note for value. It came to him from Hooker & Co., to whom it had been assigned by plaintiff, among the assets of that firm that were assigned to him for the benefit of their creditors. It is plain the defendant stands in the shoes of his assignors, and in the further consideration of the case it will be most convenient to treat it as though the action had been brought against Hooper & Co. The case naturally falls into two parts: First, is the contract which has been found by the trial court to exist between plaintiff and Hooker & Co. a "gambling contract," as those terms are used in the statute, and hence void; and second, if the contract shall be held to be obnoxious to the statute, since plaintiff has delivered the note under that contract,

^{*} See *Cunningham v. Nat. Bk. of Augusta* (71 Ga. 400), 51 Am. Rep. 266.

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can he, under the statute, recover its value from Hooker & Co., or what is the same thing, from their assignee? At the outset this court disclaims any right to review controverted questions of fact. The issues having been found for plaintiff by the lower court, it will be understood that all the facts the evidence tends to establish in his favor will, as upon a demurrer to evidence, be held to have been so found for him.

Looking into the evidence to ascertain that which it tends to prove, it is seen what the contract is or was between plaintiff and Hooker & Co., out of which the present litigation ultimately sprang. As respects the original contract plaintiff and Hooker & Co., Mr. S. G. Hooker, a member of the firm, testified that plaintiff said to him: "I don't want to pay for any property. I want to trade in options exclusively. I don't want to pay for any cash grain." To which witness replied: "You shall not. I will trade with you in differences." And again, that plaintiff further said to him: "I don't ever want to pay for any more property. I don't want to carry any more property on the board of trade. I want to trade exclusively in differences in options—betting on the market." To which witness answered: "I agreed to do just exactly that thing for him." On being asked, "what thing," the witness said, "to trade in differences and in options, and to settle upon profit and loss upon the fluctuations of the market—guessing or betting on it." Plaintiff states the contract substantially in the same way. He says: "I told him (Hooker) I didn't want to buy any grain, no lard, no pork, or any thing of the kind. He said he could make money in speculation—for instance, buy for this month for delivery next month, then settle on differences. If there was a loss, I had to pay it; and if there was a gain, he would pay it to me." The plaintiff further says neither Mr. Hooker nor Mr. Lincoln had any authority from him to deal in any other way except to settle on differences. Hooker says the contract he made with plaintiff was made on behalf of his firm, of which he was the head, and within five or six days after the making of it he informed Mr. Lincoln, his partner, of the arrangement he had made with plaintiff. It is due however to Mr. Lincoln to say that he denies all knowledge on his part that the firm had contracted to deal in options with plaintiff, but it is freely and fully admitted by Hooker the contract was made with the firm, and the trial court must have found such was the contract, and that finding is of course conclusive on this court.

It is plain that under the contract between plaintiff and the firm of Hooker & Co., it was not in the contemplation of the parties any actual purchases or sales of grain or other commodities should be made for plaintiff, or on his behalf. Indeed, it was expressly agreed none should be made. All the speculating that was to be done was to be in differences in options — or as the parties termed it, “betting on the market.” Of course it was expected by the parties that such purchases and sales of grain or other commodities that should be made were to be made on the board of trade. As was said by this court in *Pixley v. Boynton*, 79 Ill. 351, the true idea of an option is what are called in the peculiar language of the dealers, “puts” and calls.” A “put” is defined to be the “privilege of delivering or not delivering” the thing sold, and a “call” is defined to be the “privilege of calling for or not calling for” the thing bought. “Optional contracts,” in this sense, are usually settled by adjusting market values, as the party having the “option” may elect. It is simply a mode adopted for speculating in differences in market values of grain or other commodities. It must have been in this sense the term “option” is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a “gambling contract.” Fictitious purchases or sales, such as were in the contemplation of the parties, were as nothing, and it is a matter of no consequence where it is pretended they were made — whether on the board of trade or elsewhere. It would have been quite as well, and would have conformed as nearly to the contract of Hooker & Co., had they simply entered upon their books they had made such purchases or sales on behalf of plaintiff, without going upon the board of trade, and claiming they had made such purchases and sales, and on returning made such entries. “Betting on the market” could be done just as well in that way as in any other. It needs no illustration to make it apparent the contract between plaintiff and Hooker & Co., as the trial court must have found it from the evidence, comes exactly within the meaning of section 130 of the Criminal Code, that declares: “Whoever contracts to have or to give to himself or another the option to sell or buy at a future time any grain or other commodity,” shall be subject to a fine or imprisonment, and “all contracts made in violation of this section shall be considered gambling contracts, and shall be void.” It is seen this statute forbids any one to contract to have, or to give to

himself, or to contract to give to another, the privilege to deal in options. That is precisely what Hooker & Co. did. They contracted to give to plaintiff the privilege to deal in options and settle with them upon differences, as indicated or determined by the fluctuations of the market. That is one of the offenses against which the statute is leveled. Of course the party who contracts to have the option is equally guilty with the party who contracts to give it. It is wholly immaterial whether plaintiff knew "optional contracts," such as his agreement with Hooker & Co. contemplated, were defined by statute to be "gambling contracts." His ignorance of the statute in that respect did not change the character of the contract. Undoubtedly under the contract between the parties, Hooker & Co. may have made fictitious contracts with persons unknown to plaintiff, on the board of trade, nominally, at least, on behalf of plaintiff, for the purchase or sale of grain, and may be other commodities, which were settled by differences in market values, in which transactions the losses greatly exceeded the profits. Finally Hooker & Co. rendered plaintiff an account of such transactions, which included losses and commissions claimed to be due to them, growing out of these purchases and sales, amounting to a large sum—perhaps over \$22,000. It appears that plaintiff, by his attorney in fact, in settling this large demand made against him, paid Hooker & Co., \$2,000 in cash, and assigned to them, with his guaranty of payment written on the back, four notes of \$5,000 each, made by the trustees of the Couch estate to plaintiff. One of these notes passed to defendant, under the assignment made by Hooker & Co. for the benefit of their creditors, and is the note in controversy. It is admitted that before this suit was brought, plaintiff demanded the note of defendant, and on his refusal to deliver it this action was brought in the Circuit Court, and the recovery was for its face value and accumulated interest. It is obvious that under section 131 of the Criminal Code, which declares void all promissory notes, bills or other securities made or given, or executed where any part of the consideration thereof is money or any valuable things won by wager upon any unknown or contingent event whatever, or made or given, or executed, for reimbursing any money knowingly lent or advanced, at the time and place of such bet, to any person so betting, the assignment and guaranty of the note in controversy to Hooker & Co., under the circumstances proven, was void, and passed no title whatever to them or to their

assignee, the defendant. It was so declared by this court in *Tenney v. Foot*, 95 Ill. 99.

Assuming then as must be done, that the facts were correctly found by the trial court, the contract between plaintiff and Hooker & Co., was in law, a "gambling contract," and hence void, the question arises on the other branch of the case, whether plaintiff, either at common law or under the statute of this State, can recover that which he paid to Hooker & Co. as money or property lost in a gambling transaction, from defendant, in whose hands the specific property is found. As the solution of this question depends solely upon the construction that is to be given to the statute of this State on this subject, no investigation will be made as to what the common law was in such cases. So much of section 132 of the Criminal Code as has any application to the point being considered, is as follows: "Any person who shall, * * * by any wager or bet upon any * * * contingent event, lose to any person so * * * betting, any sum of money or other valuable thing (amounting in the whole to the sum of \$10) and shall pay or deliver the same, or any part thereof, the person so losing and paying or delivering the same shall be at liberty to sue for and recover the goods, money or other valuable thing so lost and paid or delivered, or any part thereof, or the full value of the same, by an action of * * * trover, * * * from the winner thereof, with cost, in any court of competent jurisdiction." It is said, if it shall be conceded the contract between plaintiff and Hooker & Co. were a "gambling contract," within the contemplation of the statute, this provision of section 132 does not apply to nor does it authorize an action against Hooker & Co., for the simple reason they had not won any money or valuable thing from plaintiff upon any gambling transaction — or more tersely stated, the argument is, the note in controversy "was not paid upon a bet or gambling transaction to the winner of such bet." The position taken can hardly be maintained. The agreement, as the trial court was authorized to find it, is that Hooker & Co. contracted to give plaintiff the privilege to deal in options with or through them, and "if there was a loss," plaintiff was to pay it to them, and "if there was a gain," Hooker & Co., were to pay it to plaintiff, and for their services they were to be paid a commission. The suggestion that Hooker & Co. merely acted as the agents for plaintiff in these unlawful transactions may be rejected at once as having nothing in its support. There is and can

be no such thing as agency in the perpetration of crimes or misdemeanors, or indeed in the doing of any unlawful act. All persons actively participating are principals. Treating all the parties engaged as principals it is immaterial to which one the money or property lost was in fact paid or delivered,—whether to Hooker & Co., or to any of the parties on the board of trade with whom they may have made fictitious contracts, and lost—and paying to either principal is, in law, paying to the “winner.” But aside from this view, the contract in express terms provides the losses, if any should be paid to Hooker & Co., and not to the person with whom they might have had “gambling contracts” on the board of trade or elsewhere, and the money and note were so paid and delivered to Hooker & Co., as the contract provided should be done. Plaintiff could not know with whom they may have had such transactions. It was a matter about which he had no concern, for the reason he was obligating to pay the losses to Hooker & Co., and to no one else. So far as he was concerned they were the “winners” of his money and property. Plaintiff did not, and could not, know any one else in the transactions. It was from Hooker & Co., and nobody else, that plaintiff obtained the contract to deal in options, and despite all subtle reasoning on this branch of the case, it is apparent Hooker & Co. are the actual “winners” of plaintiff’s money and property, and he neither knew nor cared to whom they may have paid any portion or all of that which they obtained from him.

But there is another view that may be taken that leads to the same conclusion—that is, under the most favorable construction that can be given to the evidence the contract between the parties was that plaintiff would reimburse Hooker & Co. for any losses they might sustain in optional or gambling contracts made on the board of trade. in consideration that if any gains should be made in such dealing, Hooker & Co. would pay the same to plaintiff, and that plaintiff would pay them a commission for their services. Such a contract is obviously unlawful, as being inhibited by statute. Crim. Code, § 132. The wager in this case was upon market values within a given time, or on a given day. What is a wager? It is a contract by which two or more parties agree that a certain sum of money or other valuable thing shall be paid or delivered to one of them on the happening of a certain event. That is precisely what was done in this case. The betting was as to market values

within stated periods, and was evidently done by Hooker & Co. with others whom they may have met on the board of trade. It is not probable the parties that won in such transactions from Hooker & Co. had any knowledge of plaintiff. They looked alone to Hooker & Co. for payment of their winnings, and it is said they were paid by Hooker & Co. Plaintiff's contract — if he made any — to reimburse Hooker & Co. for any such losses paid by them, is not only contrary to the statute, but is forbidden by a sound public policy, and is therefore void.

Although the statutes being considered are highly penal, there is no warrant for construing them with any unreasonable strictness. They ought rather to have a just, if not liberal construction, to the end the legislative intention may be accomplished — to prohibit all dealings in options in grains or other commodities. Nothing is productive of more mischievous results. Considerable fortunes secured by a life of honest industry have been lost in a single venture in "options." The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the board of trade are of the utmost importance in commerce. Such contracts, whether for immediate or future delivery, are valid in law, and receive its sanction and all the support that can be given to them. It is only against unlawful "gambling contracts" the penalties of the law are denounced, and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished.

The point is made the declaration is not framed under the statute, and is not sufficient in law to support a judgment on the evidence contained in the record. The defect insisted upon is, it does not contain the words, "whereby an action hath accrued to the plaintiff according to the form of this act." The declaration is in the usual form in trover, and was evidently drawn from approved precedents. It is sufficient in law to support a judgment in trover. But if it were insufficient, under the evidence given, that objection ought to have been pointed out on the trial, as should have been done by special demurrer had the facts been stated in the declaration, when an amendment would have been allowable instantan. After verdict the declaration is clearly sufficient, under the statute of "Amendments and Joinders," § 6, div. 4, which declares no

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judgment shall be arrested or stayed after verdict for the want of any allegation or averment on account of which omission a special demurrer could have been maintained. It is now too late to insist upon the objection made, even if it might have been sustained at the trial had it been made specifically.

It is also made an objection to the present judgment it is rendered against the defendant individually, whereas he was sued as assignee of Hooker & Co., and if any judgment in this action was justifiable, it should have been rendered against defendant in his representative capacity, and not otherwise. A sufficient answer to the position taken is the supposed fact on which the error is assigned has really no existence. Defendant was not sued in his representative character, but as an individual, for his alleged personal tort. Beside that, if he is guilty of a conversion of plaintiff's property, it is his own wrongful act, and not that of his assignors. It is a matter of no consequence the descriptive appellation of assignee is affixed to defendant's name. It does not indicate he was sued otherwise than for his personal wrongful act. The suit was properly brought, and if it can be sustained it must be done against defendant as an individual, and not against him as the representative of his assignors.

As to the fifth error assigned, viz., the Appellate Court erred in not holding the Circuit Court erred in denying the motion for a new trial, based upon the affidavits filed and sworn to in the cause, there is clearly nothing in it. The granting of a new trial, under the circumstances disclosed by such affidavits, was a matter resting in the sound discretion of the Circuit Court, and it is only when this court is able to say there has been an abuse of such discretion, it will interpose. After the fullest and most careful examination, nothing is discovered that would warrant such interference in the present case.

The judgment of the Appellate Court must be affirmed, which is done.

Judgment affirmed.

DICKEY, J., dissented.

Bradley v. Rees.

BRADLEY V. REES.

(118 Ill. 387.)

Will — ambiguity — evidence.

A testator devised land to "the four boys." *Held*, that parol evidence that he had seven sons, three of whom were adults living in their own homes, and the other four were minors living with him, and his declarations before, at and after the execution of the will, were competent to show that the devise was intended for the minors.

BILL to set aside a will. The opinion states the case. The relief asked was granted below.

A. D. Duff, and George W. Smith, for plaintiff in error.

George W. Andrews, for defendants in error.

DICKEY, J. The proofs entirely fail to sustain the allegations of a want of disposing capacity in the testator, and of undue influence in bringing about the making of the will. In fact, these positions in the bill are not pressed here by counsel for defendants in error. The sole questions for our consideration arise upon the fifth clause of the will. These are its words: "To my daughter Dora L. Rees I will and bequeath the south-west quarter of the north half of section 14, town 8, range 2, west — the remaining lands owned by me to be divided between the four boys."

[Omitting other questions.]

It is also insisted, and this most strenuously, that the description of the donees of "the remaining lands" is too indefinite, and in fact void for uncertainty. It is said it is entirely uncertain as to whom reference is had by the use of the words, "the four boys." It is said the testator had then living seven sons, and it is therefore said there is no lawful means of ascertaining which of the seven sons was meant by the words, "the four boys." When it is shown that at the time of making the will three of those sons were men, and that each of them was then a married man and the head of a family of his own, with whom he resided, away from the parental roof, and that the other four sons were at that time minors, living at home with their father, the testator, and constituting a part of

his household, it seems exceedingly plain that by the term, "the four boys," used in the connection in which these words were, the testator meant his four minor sons, who were living with him as a part of his household.

It is said this is a patent ambiguity, and it is only latent ambiguities which can be explained by parol proof. We do not think so. Take the will upon its face, and the inference would naturally be that the testator had but four sons, and there is therefore on the face of the will, no ambiguity. It is only from proof *aliunde* there were seven sons, that any ambiguity is made apparent. In such case, the circumstances under which the words were used may be proven, to enable us to determine what meaning is to be given to the words, as used. In addition to the facts above referred to, it is made apparent from the instructions given by the testator to the scrivener and from the repeated declarations of the testator, both before and after the making of the will, as well as by proof of the gifts which he had made to each of his adult children upon their marriage, that by the words, "the four boys," the testator meant his four sons who were then minors, and living with him as a part of his family.

The whole subject of the admissibility of parol evidence in fixing the object or the subject of a devise or bequest, and of the limitations upon the admissibility of such evidence, is fully discussed, and the authorities collected, in 1 Jarman on Wills, chapter 13, with notes and references to American decisions. We do not deem it necessary to enter here in detail, upon that discussion, but content ourselves with saying that the subject of the gift to Dora cannot lawfully be modified by parol proof, because the description in the will is certain and definite. No equivocation (as it is called in the books) is found in the words of the will in relation to the property described. The clear provisions of the will cannot be changed by parol proof. On the other hand, the proof that the testator had seven sons (unless we limit the term "boys" to males who are minors) creates what is called an equivocation, and the authorities show that in such case the parol proof — not only of previous facts which were known to the testator, and of present circumstances in the midst of which he made his will, but his declarations made at the time of making the will, as well as before and after the making of the will, may be resorted to, to remove the equivocation and fix the objects of his bounty.

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The decree in this case is therefore reversed, and the cause remanded, with directions to dismiss the original bill for want of equity.

Decree reversed.

HOAGLAND V. CRUM.

(113 Ill. 365.)

Landlord and tenant — lease from tenant for life — termination.

Where a tenant for life leases the estate for a term of years at a yearly rent, and dies before one of the rent days, the rent cannot be apportioned, and the tenant may quit free of rent from the last rent day; but if he remains, and the reversioner acquiesces, the latter may recover for his use and occupation from the lessor's death.

ACTION for use and occupation of land. The opinion states the case. The defendant had judgment below.

F. W. McNeeley and S. H. Blaine, for appellants.

Morrison & Whitlock, for appellee.

SCOTT, J. This suit was brought by the heirs at law of Martin Hoagland, deceased, to recover for the use and occupation of certain premises, against the occupying tenant, John Crum. To the first plea filed by defendant a demurrer was sustained, and on leave given, defendant filed an amended or second special plea, in which it was averred the cause of action in the declaration mentioned was for the rent of certain premises, which are accurately described, and for no other cause whatever; that such lands were leased by defendant from Louisa A. Hoagland, widow of Martin Hoagland, and not from plaintiffs or either of them; that such lands were leased of and from Louisa A. Hoagland, for one year, viz., from the 1st day of March, 1881, to the 1st day of March, 1882; that such lands were held by Louisa A. Hoagland as and for her life estate or dower interest in the lands of which Martin Hoagland died seised and possessed, and by no other right or title whatever; that the rents for the premises did not fall due and become payable until the expiration of the lease, on the 1st day of March, 1882; that on the 1st day of November, 1881, and after the premises had been so leased by defendant, and before the rent therefor became

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due and payable, Louisa A. Hoagland departed this life, and that plaintiffs claimed to recover the rents in this suit of and from defendant, as heirs at law of Martin Hoagland, and not otherwise. To this plea plaintiffs interposed a demurrer, which was overruled by the court, and plaintiffs electing to abide by their demurrer, judgment was rendered for defendant, and against plaintiffs, for costs. That judgment was affirmed in the Appellate Court for the Third district, and a majority of the judges of that court having made the necessary certificate to enable them to do so, plaintiffs bring the case to this court on their further appeal.

The single error assigned is, the Circuit Court erred in overruling the demurrer to defendant's second or special plea, and in rendering judgment against plaintiffs for costs. Had it been averred in the plea that defendant quit the premises on the determination of his lease by the death of his lessor, the plea would undoubtedly have been good. There can be no pretense that the heirs could recover for use and occupation while defendant occupied the premises under his lease from the owner of the life estate. But the plea contains no averment that defendant quit the premises on the death of his lessor. Although the plea contained no specific averment to that effect, the inference from the facts stated is, he occupied the premises up to the 1st day of March, 1882, when the lease, by its terms, would expire. On that hypothesis, no reason is perceived why defendant would not be liable for the use and occupation of the premises from the termination of his lease by the death of his lessor, up to the time when he surrendered the possession to the heirs, who were the owners of the fee, subject only to the dower or life estate of the widow. Of course the death of her who had the life estate, and who died before the end of the year, terminated defendant's right to occupy under her, and so long as he may have thereafter occupied the premises, it must have been under the heirs, who were then the owners of the fee, unincumbered by the life estate of the dowress. It is nowhere averred in the plea that the heirs objected to his occupancy for the remainder of the year, or that he was evicted by them after the termination of his lease on the death of his lessor. At common law, where a tenant for life gave a lease for a term of years, rendering a yearly rent, and died in the course of the year, before the day appointed for the payment of the rent for the term of years, the rent could not be apportioned. It was for the reason that the contract was an entirety. But the tenant

might quit the premises if he chose, on the death of his lessor, and paying no rent to any one for the occupation since the last day appointed for payment of the rent. 3 Kent Com. 371; 2 Bl. Com. 124. The statute (George II, chap. 19, § 15) that gave the executors or administrators of the life tenant on whose death any lease determined, the right to recover of the tenant a ratable proportion of the rent from the last day of payment to the date of the death of the lessor, has never been adopted by any act of our legislature, so that in that respect the common law remains unchanged in this State. There are many statutes of this State providing remedies where the common law afforded none, and this may be *casus omisus*. At all events, it seems the law now is, if a tenant holds under one having only a life estate, if he shall quit the premises on the death of his lessor, which determined his lease, before the rent becomes due and payable, he will be liable to pay rent to no one—neither to the representatives of the owner of the life estate, nor to the owner of the fee, who may be entitled to immediate possession.

But where the tenant elects to continue to occupy the premises after the determination of his lease by the death of his lessor, and the owner of the reversion acquiesces in such holding, there is no rule of law that would prevent the owner from recovering of the tenant the reasonable value for the use and occupation of the premises. A statute of this State provides the owner may recover rent, or a fair and reasonable satisfaction, for the use and occupation of lands, where the same are held and occupied by any person without any special agreement for rent, by an action of debt or *assumpsit*, in any court of competent jurisdiction. That is precisely this case so far as defendant may have held and occupied the premises after the determination of his lease by the death of the owner of the life estate. The plaintiffs are the owners, and their right to recover a fair and reasonable satisfaction for the use and occupation of the premises after the title was disincumbered from the life estate of the widow, against any person who may have held and occupied the same, is clear. As against their rights, whatever they may be, the plea presents no defense, and the demurrer should have been sustained.

It is obvious the administratrix of the dowress could release no rights the heirs may have had against an occupying tenant, and the plea of the release of errors filed in the Appellate Court need not be considered.

Estate of Rapp v. Phoenix Insurance Company.

The judgment of the Appellate Court will be reversed, and the cause remanded, with directions to that court to reverse the judgment of the Circuit Court and remand the cause for a new trial.

Judgment reversed.

ESTATE OF RAPP V. PHOENIX INSURANCE COMPANY.

(113 Ill. 399.)

Surety — Liability of estate.

The estate of a deceased surety on a bond given by an insurance agent for faithful conduct and accounting, is liable for moneys coming into the agent's hands after the surety's death, but not for moneys coming to his hands on his retention in the agency after he had made default to the knowledge of the obligee.*

ACTION on a bond. The opinion states the case. The plaintiff had judgment below.

John A. Bellatti, for appellant.

Morrison & Whitlock, for appellee.

MULKEY, J. It is contended by appellant that the bond in question is in legal effect the same as a guaranty of future advances to the extent of \$1,000; that it did not become binding or operative upon the makers until money or other property belonging to the company came into the hands of J. B. Booker & Co. as its agents; that money or property thus coming into their hands is to be regarded in the nature of future advances, and to be governed by the same rules of law that are applicable to such advances; that the contract being indefinite as to its duration, either party had the right to terminate it on notice; that it existed, so to speak, by the continued desire or joint will of the parties, and as this, in the nature of things, could not extend beyond their joint lives, and as Rapp could not, after his decease, terminate the contract by notice, the law itself terminated it, and hence Rapp's estate is not bound for any thing that occurred after his death. Such is the position of appellant, as we understand it.

* See *Watertown Fire Ins. Co. v. Simmons* (131 Mass. 85), 41 Am. Rep. 196.

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The bond in question is something more than an ordinary contract of guaranty. It is a joint and several contract between Joseph H. Booker, Albert H. Brace and M. Rapp, on the one side, and appellee on the other. The contract discloses upon its face that Booker and Brace, under the style of J. B. Booker & Co., had been appointed agents of appellee in conducting the insurance business, and that by virtue of their appointment, and the service upon which they had or were then about to enter, certain moneys, chattels and effects would come into their hands, which of itself disclosed a sufficient consideration to support the undertaking of the obligors so long as the agency continued. The contract therefore became binding immediately upon the execution of the instrument, and had a default on the part of the agents occurred in the lifetime of Rapp, there is no question but that a joint action might have been maintained on the bond against all three of the obligors. The instrument then was a written contract, whereby the obligors, jointly and severally, bound themselves, their executors and administrators, to the extent of \$1,000, for the faithful discharge of the duties of two of them in a certain specified business of a confidential character. Two of the obligors stipulate for their own honesty and business fidelity; the other joins in the stipulation, and also individually guarantees the same thing. It is to be observed that unlike an ordinary continuing guaranty, as it is claimed this is, nothing is to be done by any of the parties to the instrument to give it effect or make it binding upon them, as is always the case where the payment of future advances merely is guaranteed. The difference between the two cases is well illustrated by the language of the court in *Jordan v. Dobbins*, 122 Mass. 168; s. c., 23 Am. Rep. 305, cited and relied on in appellant's brief. In that case the goods sued for were sold after the guarantor's death, and the court in holding there could be no recovery, among other things said: "An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until acted upon it imposes no obligation, and creates no liability of the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them. It is in the nature of an authority to sell goods upon the credit of the guarantor, rather than a contract which cannot be rescinded except by

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mutual consent. Thus such a guaranty is revocable by the guarantor at any time before it is acted upon. Such being the nature of the guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor for goods sold after the death."

Without expressing any opinion for the present in respect to the conclusion reached in that case, we fully concur in the general expressions of the court with regard to the peculiar character of a continuing guaranty where it is supported by no consideration other than advances to be made at a future day, and where the party to whom the guaranty is given assumes no obligation to make such advances, as is generally the case with such guaranties. But the transaction now under consideration can hardly be said to be a guaranty of this character. Taking a common-sense business view of the matter, the giving of the bond and its acceptance by the company were the final acts by which Booker & Brace were clothed with authority to open an insurance office at Jacksonville in the name and on behalf of the company. And there can be no doubt but that the intrusting them with its business, and permitting them to conduct it with the public in the company's name, was a sufficient consideration, independent of the fact the instrument was under seal, to support the agreement in question. In these respects the *Dobbins* case is wholly unlike the one in hand. In this case no additional act was to be done by appellee, or any one else, to give the bond effect. Business was commenced and continued under it for a long time satisfactorily to all parties. Even according to the rule applicable to continuing guaranties, strictly so called, the bond under consideration was in full force and effect long before Rapp's death. We have looked with considerable care to see if the general principles applicable to a continuing guaranty of the kind mentioned have ever been extended to an ordinary agent's bond, as is sought to be done here, and we have wholly failed to find any authority for it, and certainly none has been cited.

Considerable space in appellant's brief is occupied in an effort to show that Rapp's liability upon the bond could have been terminated at any time before his death by his giving the company notice to that effect. Whether his liability could have been thus terminated in his life-time, or whether his executors might in this manner have terminated it after his decease, are questions which do

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not directly arise on this record, as it is not pretended any such notice was given, either before or after his death. But as these questions probably have more or less bearing upon the main question in the case, presently to be stated, they may be incidentally noticed further on.

The controlling question in the case is, whether upon Rapp's death the bond in question, by mere operation of law, ceased to have any legal effect as to subsequent transactions between the company and its agents, J. B. Booker & Co. It is a familiar rule of law that requires no citation of authority for its support, that the death of the principal is *per se* a revocation of the agent's authority, and hence all contracts or other engagements subsequently entered into by the latter, on behalf of the principal, are absolutely void as to his legal representatives, and this notwithstanding the death of the principal was unknown at the time such contracts or other engagements were entered into. On the other hand, the general rule unquestionably is that all contracts entered into by one, not of a personal character, are equally binding upon himself and his legal representatives after his decease. This general rule is well stated in Chitty on Contracts (10th Am. ed.), page 101. The author says: "It is a presumption that the parties to a contract bind not only themselves, but their personal representatives. Executors therefore are held to be liable on all contracts of the testator which are broken in his life-time, and with the exception of contracts in which personal skill or taste is required, on all such contracts broken after his death; and such parties may likewise sue on a contract, although they be not named therein." In the present case however Rapp, as we have already seen, expressly binds his executors and administrators, and hence no question of presumption of liability can arise, so far as Rapp's legal representatives are concerned, for if it be possible to bind them by any terms, they are certainly bound.

Appellant contends however as the bond is nothing more than an ordinary continuing guaranty, without limitation as to time, and could not for that reason have extended in any event beyond the guarantor's life, the provision expressly binding his personal representatives must have been intended to apply only to such defaults as might occur during his life-time. For reasons already appearing, and others hereafter to be stated, we do not think this view is sound. In support of the proposition that the bond in question

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ceased to have any legal effect or binding force upon the death of Rapp, as to all subsequent transactions, four cases are cited and relied on, namely, *Pratt v. Trustees, etc.*, 93 Ill. 475; *Jeudevine v. Rose*, 36 Mich. 54; *Harris v. Fawcett*, L. R., 15 Eq. Cas. 311, and *Jordan v. Dobbins*, already referred to.

The principle applied to the *Pratt* case, and upon which it was decided, is the well-recognized doctrine that a mere voluntary proposition may be withdrawn at any time before such action is taken under it as will in law, show not only its acceptance; but also a sufficient consideration to sustain it as a contract. In every case of a mere voluntary proposition, if the party making it die before any action has been taken under it, his death will in law operate as a withdrawal of the proposition—consequently it cannot be accepted or acted upon afterward so as to bind his estate. The principle here stated, and which was applied to the *Pratt* case, we do not think has any application to this one.

Jeudevine v. Rose, *supra*, in some of its features is much like the case before us. In that, as in this, the action was upon a bond, which like the present case, was founded upon a sufficient present consideration, and related to a contemporaneous contract of indefinite duration, which was subject to be abrogated by either of the parties to it and of course upon such abrogation the bond itself would have become *functus officio*. Here the resemblance between the two cases ceases. The bond in that case was a guaranty of future sales; in this case it is a guaranty of the honesty and fidelity of particular persons in a specified business. In that the money sought to be recovered was the price of goods sold after the obligee in the bond had been expressly notified not to make any further sales on the faith of the defendant's guaranty. In this case, neither Rapp, in his life-time, nor his executors, after his decease, gave any such notice. It will be thus seen the two cases differ materially in a number of important particulars, so that there is no ground for the claim that that case controls this. The actual point decided in the Michigan case is, that the surety (the obligor in the bond) had the right to terminate his liability upon it by giving notice, as he did. This certainly falls far short of sustaining the position that a liability of that character is determined by death, without such notice.

Harris v. Fawcett, *supra*, was a chancery proceeding. The guaranty in that case was one of future advances, wherein it was

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expressly provided the guaranty should continue for six months' notice in writing, under the hand of the guarantor, "to discontinue the same." The guarantor died, leaving as his executor the debtor on whose account the guaranty had been given. It was known to the creditor having the guaranty, there was no personal estate to discharge the liability of the deceased upon the guaranty, nevertheless they continued to make advances to the executor, on the faith of it, after the guarantor's death. This was such a transaction between the creditors and the executor, who was acting in manifest disregard of his duty to the estate, with their knowledge, that no court of equity ought to have sustained it, and so it was held. In that case, as we have just seen, the right to terminate the contract by six months' notice was expressly reserved in the contract itself. But as the death of the guarantor rendered it impossible to give the kind of a notice provided for, namely, a notice under the guarantor's own hand—a fact to which the court seems to have attached considerable importance—it was held, as the contract was clearly not intended to continue forever, the estate of the guarantor, under the circumstances, was not bound for advances made after his death. The case however is not an authority for the proposition that the death of a guarantor in a case like the present is *per se* an abrogation of the contract. On the contrary, the logic of the entire reasoning of the court leads irresistibly to the opposite result. In the present case there is no provision in the contract of the obligors by which they are authorized to terminate their liability on the bond, and the duration of their liability is therein expressly declared to be during the time J. B. Booker & Co. officiate as agents of the insurance company, so it is clear the contract in this case is essentially different from the one in that, but the reasoning in that case as just observed, is clearly against the appellant in this.

In the case of *Jordan v. Dobbins, supra*, the action was brought on a continuing guaranty to recover the price of goods sold after the guarantor's death, and it was held there could be no recovery, on the ground that the guarantor's death terminated the guaranty, notwithstanding it was unknown at the time the goods were sold. In thus holding, the case is clearly unsupported by the decided weight of authority. *Chitty Cont., supra*; *Brandt Suretyship*, § 113; *Green v. Young*, 8 Greenl. 14; s. c., 22 Am. Dec. 218; *Moore v. Wallis*, 18 Ala. 458; *Royal Ins. Co. v. Davies*, 40 Iowa, 469; s. c.,

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20 Am. Rep. 581; *Menard v. Scudder*, 7 La. Ann. 385; s. c., 56 Am. Dec. 610. If as contended by appellant, there is no difference in principle between that and the present case, it must be admitted the former is an authority directly in point sustaining his position; but as already indicated, we think there is an essential difference between a guaranty of future advances, whether in the form of bond or as is usually the case of a mere stipulation, and a bond executed by an agent and his sureties for the faithful discharge of the former's duties in some business or employment, as was the case here. Such a bond is in all its essential features like the bond of an executor, guardian, trustee, and the like. The only difference between the two cases is, that most of these bonds are required to be taken by express statutory provision. But this only relates to the duty of giving such a bond. It does not change its scope, character or legal effect when given. All voluntary bonds executed for a lawful purpose, like statutory bonds, derive whatever efficacy or binding force they have, from the positive law of the State, and in this respect there is no difference in the two classes of bonds. To hold that the estate of a surety on an ordinary trustee's bond is absolutely discharged from all future liability upon the death of the surety, on the ground that his death is *per se* an extinguishment of the bond, would certainly be a startling proposition to come from this or any other court of final resort; and yet to decide this case in conformity with appellant's theory would be in legal effect, to assert, as we understand it, that very proposition. We unhesitatingly decline, both upon reason and authority, to give our adhesion to any such doctrine. We have no doubt of the correctness of the ruling of the trial court in allowing appellee's claim to the extent it did.

With respect to the question raised by the assignment of the cross-error, but little need be said.

We are of opinion the court also ruled properly in refusing to allow to appellee the amount of deficit for the month of February—not on the ground however the bond had become *functus officio*, but because the company, in retaining in its service J. B. Booker & Co. after notice of the January default, which was just cause for discharging them, violated a duty which it impliedly assumed to Rapp and his legal representative on accepting the bond. When the employer of a clerk or other agent takes from another a bond of indemnity or other instrument, guaranteeing the honesty

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and fidelity of such clerk or agent while in the service of the employer, the latter impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and that in the event he does so without the surety's consent, it is to be at the employer's own risk. This is not only fair dealing and common honesty, but it is a rule of law also. The principle here announced is well established by the authorities. *Phillips v. Foxall*, L. R., 7 Q. B. 666; *Anderson v. Aston*, L. R., 8 Exch. 73.

Holding, as we do, the ruling of the trial court was correct in allowing the claim for the amount it did, it follows the Appellate Court properly affirmed the order.

DICKEY and CRAIG, JJ., dissented.

Judgment affirmed.

GARDT V. BROWN.

(118 Ill. 475.)

Contract — two instruments — deed and lease — construction.

The owner of a hotel deeded a strip of land in the rear of the hotel, for the erection of a saloon, and at the same time executed to the grantee an agreement for a lease of two rooms in the basement of the hotel for five years, to be used for billiard rooms in connection with the saloon. The deed granted the right to use the south wall of the hotel to join the roof of the building he might erect, and the privilege to cut a door through from such building into the basement of the hotel. *Held*, that the deed and the agreement for the lease should be construed together, and gave the grantee no right to maintain the door after the expiration of the lease, and that parol evidence to vary the written agreement was incompetent.

BILL for injunction. The opinion states the case. Bill dismissed below.

McKenzie & Calkins, for appellants.

Willoughby & Dougherty, for appellees.

WALKER, J.* It appears from the record that G. Henderson and

*PER CURIAM: The opinion in this case was prepared by the late Mr. Justice WALKER, but in consequence of his illness at the January term, 1885, it was not read and considered by the other members of the court during his

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P. Holstrom, prior to July 20, 1878, had leased two rooms in the basement of Brown's hotel, in Galesburg, in this State, in which they kept a dram-shop and billiard saloon. Their lease was about expiring, when it was agreed the owners of the hotel would sell to Henderson a strip of ground in the rear of the hotel, on which to erect a building for a dram-shop, and to lease the two rooms at a reduced rent, and to permit Henderson to cut a door in the wall between his saloon building and these rooms. The arrangement was made, and the deed conveying the property was executed, giving permission to Henderson to join his saloon building to the hotel, and to cut the door in the wall between it and these rooms. At the same time the lease was executed for the two basement rooms for five years, commencing the 20th of August, 1878, and ending August 20, 1883. Henderson erected his building, and occupied it as a dram-shop, cut the door connecting the dram-shop with the two basement rooms, and occupied them as a billiard saloon until the lease expired. When the lease expired, the owners of the hotel declined to renew the same, but permitted Henderson to occupy the rooms by the month. About the 1st of April, 1884, the owners of the hotel agreed to lease these rooms to Case, the proprietor of the hotel, and some time in that month Henderson sold his saloon property to Gardt, Frohlich & Nurdlinger, the appellants. On the last day of April, 1884, the owners of the hotel demanded the possession of the basement rooms, and on the 7th of May following, Henderson surrendered possession and returned the keys of the rooms. On the same day, the owners of the hotel proceeded to close the door, but were prevented by force. Subsequently appellants filed a bill and procured a temporary injunction restraining the closing up of the door, or from in any manner interfering with it, or from preventing ingress or egress to and from appellant's building by way of the basement rooms. An answer was filed and a motion entered to dissolve the injunction, which motion was heard on bill, answer and affidavits, and an order was entered dissolving it, and dismissing the bill.

It is insisted the court erred, because it is claimed that the pro-

life-time. The case was continued under advisement until the March term, 1885, when the opinion was read and concurred in by a majority of the members of the court, and it was then adopted and ordered to be filed as the majority opinion of the court, a minority of the members of the court not concurring therein.

vision in the deed is a covenant that runs with the land. The clause of the deed relied on is as follows: "Said Henderson shall have the right to use the south wall of said hotel building to join the roof of the building that he may erect; also to have privilege to cut a door through from the building that he may erect into the basement of the hotel, situated in the county of Knox, in the State of Illinois." The deed and lease were a part of the same agreement, and in ascertaining the intention of the parties they must be considered together. No rule of interpretation is more familiar, than when two instruments are executed as the evidence of one transaction, they shall be read and construed as one instrument. Then when the deed and lease are read together, what was the purpose of the parties as manifested by these instruments? Henderson was purchasing this ground on which to erect a building for the purpose of a dram-shop. He was leasing these rooms in the basement for the purpose of a billiard saloon. By opening this door in the wall of the hotel it established a communication between the dram-shop and the billiard saloon, which was no doubt intended to increase the custom of both during the continuance of the lease. It was for the better and more profitable enjoyment of the lease that Henderson was given permission to cut the door in the wall. The door was manifestly ancillary, or an appendage to the lease, and for its more commodious enjoyment. Had this provision been embodied in the lease, we suppose no one would have doubted the proposition; and yet it is as manifest such was the intention of the parties, although found in the deed. Can any one imagine that the owners of the hotel intended to bind themselves to lease the rooms perpetually on the same terms, and for the same purpose to Henderson and his grantees? Surely not. Or that they were binding themselves to forever keep the house as a hotel? Such a construction would be manifestly against the intention of the parties. Nor is it any more reasonable to suppose they intended to covenant that the door should continue perpetually, when it could not be of the slightest benefit to appellants, as with the expiration of the lease all their right to enter the rooms terminated, absolutely and unconditionally. Nor is it claimed that the owners of the hotel have no right to shut off all access to these rooms from all other quarters; and if so, what possible benefit can appellants derive from keeping it open? Absolutely none. The law will not interfere to enforce a mere barren right, if they had such, and that

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seems to be all that is claimed. There can be no question that appellees may cut off all access to these rooms other than by this door. That does not seem to be denied. Nor is there any thing in the deed from which it can be inferred that the owners undertook to keep any pass-way from the hotel, or from the outside of the building open to these rooms.

If the claim of appellants is well founded, that this door must be kept open that guests may have access to the dram-shop from all parts of the hotel, then appellants have acquired these basement rooms as a pass-way for all time to come. It is wholly unwarrantable to infer that either party supposed that such was the effect of the deed. Business men do not so act, and had it been their intention it would have been so expressed. The only reasonable inference from the language of the deed is, that it was intended to enable the lessee to enjoy his term with more advantage and profit during its continuance, and to terminate with the lease—that the privilege of using the door was co-extensive only with the lease, and terminated with it. The construction contended for would virtually give appellants the control of appellees' property. It would deprive them of the right to appropriate the hotel building to any other use. The presumption that the parties so intended is so utterly improbable that no strained construction will be indulged to reach such a conclusion, and to do so such a construction must be adopted, or rather without any thing to warrant such a conclusion by any kind of rule of interpretation.

Affidavits were filed to explain the intention of the parties when these instruments were executed. All know that it is an inflexible rule that when parties reduce a contract to writing, the presumption is it speaks their intention, and the rule excludes all extrinsic evidence to change or vary the intention as expressed in the written agreement. In some cases verbal evidence is admissible to show the purposes and circumstances under which the contract was entered into by the parties, but not to vary, alter or contradict its terms. From the affidavits filed, the purpose seems to have been not to accommodate the dram-shop alone, but both it and the billiard saloon jointly, and if so, then when the lease expired and the billiard saloon was ended, the joint purpose ended, and when that occurred, one of the main purposes of licensing the opening of the door had been accomplished, and the joint purpose was fulfilled, and being so the privilege came to an end. Parties in such cases

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cannot change agreements by testifying to their intention or understanding of a written agreement. It must speak for itself, and that intention must be gathered from the language the parties have employed to express that intention. If a mistake has occurred in drafting the contract, contrary in any particular to their intention, the parties may by bill reform the agreement. But nothing of the kind is alleged in the bill in this case, and we must look to the agreement itself for its meaning, and when ascertained it will be enforced.

It is urged that the court, on dissolving the injunction, should have retained the bill for a hearing on evidence. We are unable to perceive any reason for doing so, because the bill on its face disclosed no equity, and unless it had been amended it would have been useless to retain it for any purpose. The bill as framed involved only the construction of the deed and lease, and that arose on the bill. It was therefore improper to retain the bill, as to have done so would only have resulted in increased costs. Appellants have treated the decree as final, and had they not, their appeal would be dismissed. The Circuit judge, who tried the case, made this order: "The order is that the injunction be dissolved; and further, if complainants desire to take an appeal, that the bill be dismissed." It was then optional with appellants to have the bill retained or to consider it as dismissed. By appealing they chose to have it dismissed, and having made the election they must be held to their choice.

After a careful examination of the entire record and arguments in the case, we are unable to perceive any error, and the decree of the court below is therefore affirmed.

Decree affirmed.

CASES
IN THE
SUPREME JUDICIAL COURT

MASSACHUSETTS

RODLIFF V. DALLINGER.

(141 Mass. 1.)

Sale — to pretended agent — bona fide pledgee.

The plaintiff, refusing to sell to C., a broker, delivered goods to him on his representation that they were for an undisclosed principal in good credit, entering and billing them as a sale to C. It turning out that there was no such principal, *held*, that the plaintiff might maintain replevin for the goods from the defendant, C.'s *bona fide* pledgee.

REPLEVIN. The head-note states the case. The plaintiff had judgment below.

H. D. Hyde, for defendant.

A. Hemenway, for plaintiffs.

HOLMES, J. The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer in good credit with the plaintiffs. This evidence was not objected to, and was admissible, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson, and that a bill was made to him. *Commonwealth*

v. *Jeffries*, 7 Allen, 548, 564. It was admitted that Clementson, in fact, was not acting for such an undisclosed principal; and it follows that if the plaintiffs' evidence was believed there was no sale. There could not be one to this supposed principal, because there was no such person, and there was not one to Clementson, because none purported to be made to him, but on the contrary, such a sale was expressly refused and excluded. *Edmunds v. Merchants' Despatch Transportation Co.*, 135 Mass. 283.

It was suggested that this case differed from the one cited, because there the principal was disclosed, whereas here he was not, and that credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason in Clementson's representations for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party. And if the jury find that such a sale was the only one that purported to be made, the fact that it failed does not turn it into a sale to the party conducting the transaction. *Schmaltz v. Avery*, 16 Q. B. 655, only decides that a man's describing himself in a charter-party as "agent of the freighter" is not sufficient to preclude him from alleging that he is the freighter. It does not hint, that the agent could not be excluded by express terms, or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less that in favor of third persons the agent would be presumed without evidence to be the undisclosed principal, although expressly excluded.

The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as when a vendee expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or being identified by the senses and dealt with as the person so identified, says that he is A., when in fact he is B. But when one of the formal constituents of a legal transaction

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is wanting, there is no question of rescission; the transaction is void *ab initio*, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake.

The sale being void, and not merely voidable, or in simpler words, there having been no sale, the delivery to Clementson gave him no power to convey a good title to a *bona fide* purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting *bona fide* dealers with persons in possession, in cases like the present, were much urged in *Thacher v. Moors*, 134 Mass. 156, but did not prevail. Much less can they be allowed to prevail against a legal title, without the intervention of statute.

Exceptions overruled.

 KIMINS V. BOSTON FIVE CENTS SAVINGS BANK.

(141 Mass. 33.)

Bank — savings — alteration of by-laws — effect on depositor — statute.

A depositor in a savings bank agreed in writing to be bound by the by-laws of the bank. The deposit-book contained a copy of the by laws, one of which gave the trustees power to alter or amend them. *Held*, that his right to recover money paid by the bank to a third person on a forged order was to be determined by the by-laws in force when the original contract was made, and not by a subsequent by law of which he had no notice, whether the deposit was made before or after the passage of the late by-law; and the provision of the statute, that the deposits may be withdrawn at such time and in such manner as the by-laws direct, does not make the late by-law a part of the contract.

ACTION to recover a bank deposit. The head-note states the case. The defendant had judgment below.

O. Stevens, for plaintiff.

D. W. Gooch, for defendant.

W. ALLEN, J. The only defense is, that the defendant bank was authorized to make the payments to the plaintiff's nephew on the forged order and the presentation of the deposit-book. The au-

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thority, if it existed, must have been given by the plaintiff when she made the contract of deposit, or must have arisen from an estoppel worked by her subsequent conduct. The facts stated do not show an estoppel, and the ruling of the court that plaintiff could not recover must have been on the ground that the contract authorized the payments. By the contract, the plaintiff agreed to be governed by the by-laws of the bank, and the by-laws were contained in the deposit-book given to her.

By the by-laws, as they existed at the time the contract was signed by the plaintiff, the bank had no authority to make the payments. They authorized a payment to one who falsely personated the depositor in presenting the stolen book; *Goldrick v. Bristol County Savings Bank*, 123 Mass. 320; but not to one who falsely claimed to act under authority from the depositor. *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87; *Levy v. Franklin Savings Bank*, 117 Mass. 448.

The defendant does not dispute its liability, if the case is to be determined on the construction of the by-law in force when the contract was made; but it contends that the by-law of 1875 became incorporated into the contract between the parties, and a part of it. If this was so, it would have given the defendant authority to make the payments. *Donlan v. Provident Institution for Savings*, 127 Mass. 183; s. c., 34 Am. Rep. 338.

No notice was given to the plaintiff of this by-law, and she had no knowledge of it, and the deposits made after it was passed must be taken to have been made under the original contract.

The defendant contends that the subsequent by-law became part of the contract of deposit, by force of the Gen. Stats., chap. 57, § 147, (Pub. Stats., chap. 116, § 29), which provided that the deposits might be withdrawn at such time and in such manner as the corporation in its by-laws directed, and of the by-law existing when the contract was made, which provided for making changes in the by-laws, with the plaintiff's agreement to abide by the regulations of the institution as expressed in its by-laws.

The authority of the defendant to make by-laws regulating the time and manner in which deposits might be withdrawn did not empower it to change, without the consent of the plaintiff, a contract it had made with her, nor to discharge the debt to her by payment to a stranger; nor was it any part of the plaintiff's contract that the defendant might do this. See *Donlan v. Provident Institution for Savings, ubi supra*.

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The by-law in question is not one which merely concerns the regulations of the institution as to the time and manner of paying deposits to depositors. It materially affects the contract of deposit in the interest of the bank, and not of the depositor; and if it applies to contracts made before it was passed, it authorizes the bank to pay the money of depositors to those not authorized by the contract to receive it, and to relieve the bank from its obligation to pay it the depositors. Authority to make such a material change in the contract, without the knowledge of the plaintiff, cannot be inferred from her agreement to abide by the regulations of the institution.

Exceptions sustained.

BARNARD V. COFFIN.

(141 Mass. 37.)

Agency — sub-agent's neglect — agent's liability.

An agent is liable to his principal for the neglect of a sub-agent employed by the agent with the principal's knowledge but upon the agent's account.

ACTION on contract. The opinion shows the case. The plaintiff had judgment below.

B. R. Curtis & S. G. Croswell, for defendants.

G. O. Shattuck & W. A. Munroe, for plaintiff.

FIELD, J. Of the rulings requested by the defendants, the second and third were refused because the facts were not found to be as they were assumed to be in the requests; and this is a sufficient reason for the refusal.

The remaining exception is to the refusal to rule that on the whole evidence the plaintiff could not maintain the action. The judge found that no consent was given by the plaintiff to the defendants to delegate their authority to a sub-agent, and that no custom or usage to delegate authority in similar cases was shown; and that the nature of the employment of the defendants by the plaintiff was that they undertook, for a compensation to be paid them, to aid the plaintiff in selling the land, by obtaining, if possible, offers for it, and communicating them to him, for his acceptance or re-

jection, together with such information as they could readily obtain to assist him in determining his action upon these offers, and by consummating a sale in case such an offer was accepted. The judge also found that Ochs was the agent of the defendants in the business of obtaining and transmitting offers. The evidence warranted these findings. The only question of law is whether, with these findings, the plaintiff can, on the other facts found and on the evidence, maintain his action.

If Ochs was employed by the defendants, without the express or implied consent of the plaintiff, and if there was no usage in the business to employ sub-agents and there was no necessity from the nature of the business that sub-agents should be employed, there is no privity between the plaintiff and Ochs, and Ochs is only liable to his employers, who were the defendants, and the defendants are liable to the plaintiff for the acts of Ochs, in the same manner as if those acts were their own. *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Pownall v. Blair*, 78 Penn. St. 403; *Darling v. Stanwood*, 14 Allen, 504; *Stevens v. Babcock*, 3 B. & Ad. 354.

It is argued that as the plaintiff knew before he signed the deed that the sale was made by Ochs, the plaintiff by confirming the sale and signing the deed, ratified the employment of Ochs. If the plaintiff understood that Ochs was employed by the defendants as his agent, then these acts of the plaintiff might be held to be a ratification of his employment, and equivalent to an authority to the defendants to employ Ochs as the agent of the plaintiff. But if the plaintiff understood that the defendants employed Ochs as their agent to assist them in transacting the business which they had undertaken, then these acts of the plaintiff might only show that the plaintiff was willing that the defendants should transact the business by means of their servants or agents, for whom they should be responsible; and it was competent for the judge, on the evidence, to find that this was the understanding and intention of the plaintiff, and he has in effect so found.

The principle which runs through the cases is, that if an agent employs a sub-agent for his principal, and by his authority, express or implied, then the sub-agent is the agent of the principal, and is directly responsible to the principal for his conduct, and so far as damage results from the conduct of the sub-agent, the agent is only responsible for a want of due care in selecting the sub-agent; but if the agent, having undertaken to do the business of his prin-

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principal, employs a servant or agent on his own account to assist him in what he has undertaken, such a sub-agent is an agent of the agent, and is responsible to the agent for his conduct, and the agent is responsible to the principal for the manner in which the business has been done, whether by himself or by his servant or agent.

The decision in this case, as reported in 138 Mass. 37, is that the finding that "the defendants were bound to see to it that the offer transmitted was a genuine offer and not the offer of a sub-agent," was a ruling of law which could not be supported if the defendants were only liable on the ground of negligence, and not on the ground that Ochs was their agent, for whose acts they were responsible.

Exceptions overruled.

BERNEY V. DINSMORE.

(141 Mass. 42.)

Evidence — opinion of value.

In an action against a carrier for the loss of a ring, the plaintiff, a woman, whose husband had given her the ring, and who did not know its cost or value, nor the value of pearls, was allowed to point out a pearl of corresponding size, color and general appearance, and an expert was then allowed to state the value of the pearl pointed out. *Held*, competent. (See note, p. 446.)

ACTION for conversion. The head-note states the facts. The plaintiff had judgment below.

W. B. Gale & J. W. McDonald, for defendants.

H. W. Bragg, for plaintiff.

FIELD, J. The testimony of the plaintiff described the size, shape, color, and quality of the pearl in a manner, perhaps, as accurate as she was capable of using. If any other rule were adopted than that used in this case, it might be impossible to determine the value of the pearl. When the evidence is the best evidence attainable, it should be admitted, unless admitting it contravenes some established rule of law. There is no rule which requires that a witness must be an expert to testify to the size, shape, and appear-

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ance of a visible object. The witness Foss was an expert upon the value of pearls, and he was in effect asked what a pearl such as the plaintiff had described was worth; and the description given by the plaintiff was conveyed to his mind more accurately, perhaps, by exhibiting to him pearls which the plaintiff had sworn to be in all respects like the one she lost, than could have been done in any other manner. The jury were to weigh this evidence with all other evidence concerning the age, condition, size, shape, color, and quality of the pearl, and the variations of value dependent upon these characteristics. We are satisfied that this method of determining the damages is more reasonable, and better supported by modern authority, than that laid down in *Armory v. Delamirie*, 1 Stra. 504, which was "that unless the defendant did produce the jewel, and show it not to be of the finest water," the jury "should presume the strongest against him, and make the value of the best jewels the measure of their damages."

Exceptions overruled.

NOTE BY THE REPORTER.— See *Fairley v. Smith*, 87 N. C. 367; s. c., 48 Am. Rep. 522; 87 Am. Rep. 153; note, 36 Am. Rep. 487.

In *Hancock v. Rand*, 18 Week. Dig. 206, an action against an inn-keeper for the value of articles of jewelry stolen from the room of a guest, the plaintiff, a woman, was allowed to testify to their value, although she had never dealt in such articles, and most of her knowledge was derived from hearsay. *Held*, competent but not conclusive.

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(141 Mass. 45.)

Trust — rescission.

A wife, for the purpose of evading her husband's importunities to dispose of her lands, and for a loan from a trustee, conveyed them in trust to pay her the income for her life, and on her death for her children with power to sell and to convey in certain contingencies, and reserving no power of revocation. The contingency of her surviving her husband was not provided for. The trustee sold and invested the proceeds. *Held*, that on the husband's death the widow was not entitled to rescind the trust.

BILL to set aside a trust. The head-note shows the point. The bill was dismissed below.

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G. Merrill, for plaintiff.

S. Bancroft, for Charles E. Abbott.

G. H. Poor, for plaintiff's minor children.

MORTON, C. J. It is settled by the uniform course of the decisions in this Commonwealth that a voluntary settlement, fully executed by a person of sound mind, without any mistake, fraud, or undue influence, is binding upon the settler and cannot be revoked, except so far as a power of revocation has been reserved in the deed. *Viney v. Abbott*, 109 Mass. 300; *Sewall v. Roberts*, 115 Mass. 262, and cases cited.

In the case before us, the plaintiff, acting deliberately and under the advice of counsel, executed the deed of settlement, and there is no pretense of any fraud, collusion, or undue influence. The deed contains no power of revocation, and it is clear that the power of revocation was intentionally omitted. As first drafted, the deed created a dry trust in favor of the settler, which probably could have been revoked by her at any time. But if she had retained a power of revocation, it would have defeated one of the principal objects of the settlement, which was to protect her from the threats or importunities, or influence of her husband, and therefore the deed was altered to its present form. Both parties understood that she was not to have the power to revoke it. It is not therefore a case like some of those cited by the plaintiff, where both parties supposed the settlement to be revocable, and the power to revoke was omitted by mistake. See *Aylsworth v. Whitcomb*, 12 R. I. 298; *Garnsey v. Mundy*, 9 C. E. Green, 243, and cases cited.

The justice who heard this case has found that no fraud or imposition was practiced on her; that the deed was carefully read over to her; that there was no mistake, in the sense that she thought the deed contained any other or different provision than in fact it contained; and no accident, in the sense that any thing was omitted which was intended to be put in; and also that the contingency of her surviving her husband was not in her mind or in that of her advisers, and if it had been, there was no means of determining what the provision, if any, would have been. From these findings, it is clear that there was no mistake, in the sense that she wrongly apprehended the contents of the deed. The most

that can be said is, that she did not at the time she executed the deed anticipate, or have in her mind, what would be its legal effect in the contingency of her husband's dying before her. She did not at the time think of this contingency, but this is not a mistake which will justify setting aside a settlement, especially when it is not shown that if this contingency had been in her mind, she would have made a deed in any respect different. But this was not a purely voluntary settlement. It appears that she was in financial difficulties and in present need of money, and that her brother advanced her by way of loan \$600 as a part of the transaction, and on the condition that she would execute this deed of trust. It seems to have been a family arrangement to save her property for the benefit of her children, and to protect it, not only from the demands of her husband, but possibly from her own improvidence.

It may be that the fact that there was this pecuniary consideration would not prevent a court of equity from setting aside the settlement upon proof of fraud or concealment, or upon proof of any material misapprehension on her part of facts, which if known and called to her attention, would have led to a settlement of a different character. But it throws some light upon the transaction, and tends to show that her failure to think of the contingency of her husband's death was immaterial, and that if she had thought of it, there would have been no change in the provisions of the deed. We are of opinion that the plaintiff does not show sufficient cause for setting aside the settlement, voluntarily and fairly made by her.

Bill dismissed.

COMMONWEALTH V. CHENEY.

(141 Mass. 102.)

Criminal law — liability of officer for mistaken arrest.

A police officer, acting in good faith and with reasonable cause, is not criminally liable for arresting without a warrant a sober man for being publicly intoxicated.

CONVICTION of assault. The opinion states the case.

H. I. Bartlett, for defendant.

E. J. Sherman, attorney-general, for Commonwealth.

GARDNER, J. 1. The defendant was indicted for an assault with a dangerous weapon upon one Hayes. At the trial, it appeared that the defendant was a police officer, and one of the night-watch of Newburyport, and at the time of the alleged assault, was on duty upon his beat. The defendant contended that the alleged offense grew out of an attempt made by him to arrest Hayes for the crime of drunkenness on Merrimack street, a public street in Newburyport. The defendant requested the court to rule and instruct the jury, "that if the defendant had reasonable cause to believe that Hayes was drunk, it made no difference whether Hayes was actually drunk or not; and that if the defendant had such reasonable cause of belief, the arrest was proper, so far as the act of drunkenness was concerned, and the defendant would not be liable criminally for making the arrest." The court refused so to instruct the jury, and did instruct them, "that in order to protect the officer from criminal prosecution, Hayes must have been actually drunk, and a reasonable cause of belief on the part of the officer was not sufficient."

The statute in force at the time of the assault provided that whoever is found in a state of intoxication in a public place may be arrested without a warrant by a watchman or police officer. Pub. Stats., ch. 207, § 25. The language of the statute is permissive. It gives authority to the officers named to use their discretion as to arresting an intoxicated person found in a public place. It does not compel them at all hazards to arrest such person, but leaves it to their sound judgment to decide whether, under all the circumstances of the particular case, they should arrest the offender. *Phillips v. Fadden*, 125 Mass. 198.

Although the law does not absolutely compel the officer to make the arrest, yet when he does so make it, he must be able to justify his act in a civil action, and if indicted therefor, show that he was not guilty of a criminal assault and battery. If the person arrested was actually intoxicated, within the meaning of the statute, this would be sufficient reason for taking such person into custody without a warrant.

In civil actions, it is well settled, that if the person arrested was

not in fact intoxicated, the statute gave the officer no authority to arrest, although in so doing he acted in good faith and upon reasonable grounds of belief. *Phillips v. Fadden, ubi supra*. This rule does not apply to an arrest without a warrant for a supposed felony, in which case the officer would be justified if he had reasonable grounds to suspect the person arrested of having committed a felony. *Rohan v. Sawin*, 5 Cush. 281.

The strict rule which applies to arrests for drunkenness in civil actions against officers does not govern in complaints and indictments for assault and battery against the arresting officer. It has been held that the arresting of a person in the night as a night-walker, by a lawful officer, would be illegal, if the person arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer. *Regina v. Tooley*, 2 Ld. Raym. 1296; 1 Russ. Crimes (9th Am. ed.), 809, and note. It has also been held, that ignorance of fact, without criminal negligence, will exempt one from criminal responsibility; as where a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this will not be a criminal action. 1 Russ. Crimes, 48, citing *Levett's case*, Cro. Car. 538; 4 Bl. Com. 27; and 1 Hale P. C. 42, 43.

In *Commonwealth v. Presby*, 14 Gray, 65, Mr. Justice HOAR, citing *Levett's case*, says: "The act having been done under the reasonable belief that the person killed was a felon, the excuse was held sufficient. * * * By an unlawful act is meant intentional violence, without justification or excuse." The same principle is recognized in *Commonwealth v. Woodward*, 102 Mass. 155, 161, where it was held, that unless the defendant at the time he struck the deceased, under all the circumstances of the case, had reasonable cause to believe that it was necessary to protect his person, and the blow was given by him for that purpose, he would be responsible for the consequence of the blow. Other cases to the same point might be cited.

The case of *Commonwealth v. Presby, ubi supra*, arose at a time when the statutes of the Commonwealth made it the imperative duty of an officer to arrest for drunkenness without a warrant, if he found an intoxicated person in a public place, etc. The court dwelt upon the fact that the defendant was required by his official duty to make the arrest, if the fact of intoxication existed; and decided that, "if he acted in good faith, upon reasonable and

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probable cause of belief, without rashness or negligence, he is not to be regarded as a criminal because he is found to have been mistaken."

It is difficult to note the distinction between this case and the one at bar, so far as the principle of law is laid down. The facts of the two cases are substantially the same. The only difference is this, in the first, the statute used the phrase "shall" arrest the offender; in the case we are considering, it says "may" arrest, etc. This change in the law was not intended to change the purpose of the arrest when made. *Phillips v. Fadden, ubi supra*. Before the defendant arrested Hayes, he was bound to exercise his sound judgment, and determine whether it was his duty under all the circumstances to make the arrest. But when he had exercised his discretion, we cannot see, if he acted in good faith, upon reasonable and probable cause of belief, without rashness or negligence, that he is to be regarded as a criminal, because he is found to be mistaken. The arguments and illustrations used in *Commonwealth v. Presby* apply with equal force to this defendant and the same interrogatory may be put with the like effect in this case as in that: "Is the officer to be held a criminal, if using his best judgment and discretion, and all the means of information in his power, in a case where he is called upon to act, he makes a mistake of fact, and comes to a wrong conclusion?" It is true that the officer should be required to use all reasonable means to inform himself before making an arrest under this statute; and that no encouragement should be given to careless and willful acts of violence, under circumstances where there is no necessity for any arrest or interference with the personal rights of another. The change of the statute may impose another duty upon the officer, that of determining whether, under all the circumstances of the case, there is any necessity for making the arrest. But this rests with the officer. It is for him to determine, and if he acts in good faith in relation to it, his decision is final and conclusive. We think therefore that the change in the statute has not modified the law; and that if the defendant, acting in good faith, came to the determination that it was his duty to arrest Hayes, in so doing he was governed by the same law which was enunciated in *Commonwealth v. Presby*. The fact that in that case it was the imperative duty of the officer to make the arrest, if the fact of intoxication existed, does not differ materially from a case where the officer,

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acting in good faith, believed that it was equally his duty to make the arrest if the fact of intoxication existed. In both cases the officers were required by official duty to make the arrest—one by imperative duty under the statute, the other by a duty equally imperative, growing out of the circumstances of the case, and impelling him as a faithful officer to make the arrest.

Although the instructions prayed for should have been given in some form, they ought not to have been given in the bald form in which they were framed by the defendant. The jury should have been instructed, in substance, that if the defendant acting in good faith, under all the circumstances of the case, believed that it was necessary that Hayes should be arrested for drunkenness, and in making such arrest, acted without rashness or negligence, upon reasonable and probable ground of belief that Hayes was intoxicated, and it turned out that Hayes was not intoxicated, and the officer was honestly mistaken as matter of fact, the jury ought not to find him guilty of assault and battery, unless in making such arrest the officer used more force than was necessary.

[Minor point omitted.]

Exceptions sustained.

FARNHAM v. PIERCE.

(141 Mass. 203.)

Parent and child—statute awarding custody to overseers of poor—constitutionality—restoring custody.

A statute authorizing courts and magistrates to award to the overseers of the poor the custody of children found to be neglected by their parents, and growing up without education or salutary control, and in circumstances exposing them to lead idle or dissolute lives, is constitutional, but such adjudication is not conclusive, and on *habeas corpus* the custody may be restored on showing the removal of the cause and the parents' competency and fitness. (*See note, p. 456.*)

THE opinion states the case.

G. E. Williams, for petitioner.

F. V. Fuller, for respondents.

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W. ALLEN, J. The father of an infant four years of age, who has been committed to the custody of the overseers of the poor of the city of Taunton by the First District Court of Bristol on findings that she was by the neglect of her parent growing up without education or salutary control, and in circumstances exposing her to lead an idle and dissolute life, and that she had a settlement in Taunton, seeks her discharge from custody on a writ of *habeas corpus*, on the ground that the statute of 1882, chap. 181, § 3, under which the court acted, is contrary to article 12 of the Declaration of Rights of this State.

The section of the statute is as follows: "Whenever it shall be made to appear to any court or magistrate that within his jurisdiction any child under fourteen years of age, by reason of orphanage, or of the neglect, crime, drunkenness, or other vice of his parents, is growing up without education or salutary control, and in circumstances exposing him to lead an idle and dissolute life, or is dependent upon public charity, such court or magistrate shall, after notice to the State board of health, lunacy and charity, commit such child; if he has no known settlement in this Commonwealth, to the custody of said board, and if he has a known settlement, then to the overseers of the poor of the city or town in which he has such settlement, except in the city of Boston; and if he has a settlement in said city, then to the directors of public institutions of said city until he arrives at the age of twenty-one years, or for any less time; and the said board, overseers and directors are authorized to make all needful arrangements for the care and maintenance of children so committed in some State, municipal or town institution, or in some respectable family, and to discharge such children from their custody whenever the object of their commitment has been accomplished."

This is not a penal statute, and the commitment to the public officers is not in the nature of punishment. It is a provision by the Commonwealth, as *parens patriæ*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost. In this respect the statute manifestly differs from the construction given to the statutes under which *People v. Turner*, 55 Ill. 280; s. c., 8 Am. Rep. 645; and *State v. Ray* (N. H., July, 1885), 32 Alb. L. J. 349, were decided, and resembles more the statutes considered in *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; s. c., 22 Am. Rep. 702; *Fer-*

rier's Petition, 103 Ill. 367; s. c., 42 Am. Rep. 10; *McLean Co. v. Humphreys*, 104 Ill. 378; *Prescott v. State*, 19 Ohio St. 184; s. c., 2 Am. Rep. 388; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Ex parte Crouse*, 4 Whart. 9; and *Roth v. House of Refuge*, 31 Md. 829.

It does not punish the infant by confinement nor deprive him of his liberty; it only recognizes and regulates, as in providing for guardianship and apprenticeship, the parental custody which is an incident of infancy.

It is argued that the right of the father to the society, education and earnings of his child is taken from him by a summary proceeding, without notice or trial: If the statute is to be construed as authorizing a final adjudication upon the rights of the father, taking from him the custody and care of his child, it would be a grave question whether it could be sustained. But we do not so construe the statute.

It provides custody for a child who is suffering for the need of it in consequence of the death or unfitness of its parent. The fact of the death or neglect or crime or vice of the parent shows the condition of the child — that he is in need of parental custody. The fact that he is suffering morally for want of parental restraint calls for immediate appropriate relief, as would the want of food or shelter. The inability or failure of the parent to furnish the relief is intended to show the need of the child, not to be the basis of a decree against the parent. *Milwaukee Industrial School v. Supervisors*, *ubi supra*.

It is argued that the statute authorizes the commitment of the child to custody until his majority, and only gives the board to which he is committed discretionary authority to discharge him, and that it thus wholly deprives the parent of the right to the custody. The answer is that the father is not bound by the adjudication, and his rights are not affected by it, except incidentally and to a limited extent necessary for the good of the child.

It would be an entirely natural and proper provision in a commitment intended to bind the child and strangers only, that it should be during minority, or for a shorter time, in the discretion of the committing magistrate; and it is not necessary to infer from such a provision an intention that the rights of the father should be adjudicated and determined which would not have been found without it. That that was not the intention of the legislature appears from various considerations beside those already referred to.

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The proceeding is intended to be summary. Any magistrate is authorized to act when it shall be made to appear to him, etc. No complaint or written application to the magistrate is required, and no notice to any one, except to the State board of health, lunacy and charity after it shall have been "made to appear." No trial is required, and it might be "made to appear" by inspection of the child and his surroundings without any other proceeding. The statute not only requires no notice to the parent, but does not make him a party, and gives him no right to be heard, even if present; and it does not prescribe a fact as constituting the unfitness of the parent — as support as a pauper or sentence to the State prison for instance — but leaves the question of unfitness, in the respects specified, to the summary determination of any magistrate without revision or appeal. As a proceeding to ascertain whether a child, who is growing up without salutary control, and exposed to vicious habits, is in that condition, in spite of proper parental control, or for want of it, with a view of supplying the control, if needed, the meaning of the statute is plain, and in the line of legislative precedent; as a proceeding to determine the fact of the father's unfitness and consequent forfeiture of his parental rights, and to adjudicate upon his right to the custody of the child, it lacks essential features which we are accustomed to find in all legislation affecting rights of property or persons; and we do not think that the necessity of construction requires us to give that meaning to the language of the statute.

The finding of the District Court must be taken to be that the child was in the condition which required the custody of the overseers of the poor according to the statute, and she was given into their custody for that reason, and not because the father was adjudged to have forfeited his right. The commitment is valid, and the custody in which the child is held is lawful, and subject to the rights of the father. The statute does not provide any way in which the father can maintain his rights. He can apply to overseers of the poor to discharge the child, for the reason that the object of the commitment has been accomplished, and on showing his ability and fitness to take charge of the child, she should be discharged to them. The statute leaves that in their discretion, it is true, and as to matters other than the right of the parent, their discretion may be absolute; but the rights of the parent can be protected on *habeas corpus* by this court. *Milwaukee Industrial School v. Supervisors* and *House of Refuge v. Ryan*, *ubi supra*.

We think that the commitment is evidence of the condition of the child, as in need of restraint on account of the neglect of the parent, at the time of the commitment; but that it is not binding upon the father as an adjudication upon his rights, and that he has a right to show that the cause stated for the commitment does not now exist, that he is competent and fit to have the care of the child and that the welfare of the child will permit of her removal from her present custody.

The case should be remitted for further hearing before a single judge.

Ordered accordingly.

NOTE BY THE REPORTER. — The leading case seems to be *Ex parte Crouse*, 4 Whart. 9, A. D. 1838, where the court said: "The house of refuge is not a prison, but a school. Where reformation and not punishment is the end, it may indeed be used as a prison for juvenile convicts who would else be committed to a common jail; and in respect to these, the constitutionality of the act which incorporated it stands clear of controversy. It is only in respect of the application of its discipline to subjects admitted on the order of a court, a magistrate or the managers of the alms-house, that a doubt is entertained. The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and above all by separating them from the corrupting influence of improper associates. To this end, may not the natural parents, when unequal to the task of education or unworthy of it, be superseded by the *parens patrie*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are at its sufferance? The right of parental control is a natural but not an unalienable one. It is not excepted by the declaration of rights out of the subjects of ordinary legislation; and it consequently remains subject to the ordinary legislative power, which if wantonly or inconveniently used, would soon be constitutionally restricted, but the competency of which, as the government is constituted, cannot be doubted. As to abridgment of indefeasible rights by confinement of the person, it is no more than what is borne, to a greater or less extent, in every school, and we know of no natural right to exemption from restraints which conduce to an infant's welfare."

In *House of Refuge v. Ryan*, 37 Ohio St. 197, the court said: "It was not the intention to confer upon mayors and like officers judicial powers over the legal rights of parents to the custody of their children. The paramount object is the good of such infants as are destitute of parental care. It is the exercise of that parental guardianship which the State has assumed. The proceeding is, in its nature, special. While notice to parents or others standing in that relation to infants should be given where practicable, it is not

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essential to the jurisdiction of the examining officer. These officers are not invested with power to finally adjudicate the legal rights of parties. The scope and purpose of this statute is to provide, in a summary manner, for the destitute and homeless, as well as the vicious, and to provide for the maintenance and discipline of those who might otherwise grow up in the habits of idleness and crime. It is conceded that such a notice is not required when the infant is accused or convicted of crime, or is held as a witness. This is so, not because the parent has forfeited any of his legal rights, but because in such cases the police power of the State is paramount. So where the grand jury, in place of an indictment for crime, makes a return that the infant should be committed to the house of refuge, or the reform farm, the court, after notice to the infant alone, and without a jury, determines the case, and commits the accused.

"If this is a correct exposition of the statute, the next inquiry is, whether an act which does not require notice is against public policy, and in violation of the fundamental law of the land? The error of the court below consisted in assuming that the judgment of the committing officer divested the parent of his legal right, without an opportunity of being heard. It is obvious that this is a misconception. The proceeding is purely statutory. It is intended to provide a summary method for caring for destitute children.

"The commitment is not designed as a punishment for crime, but to place destitute, neglected and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities, for their proper care and to prevent crime and pauperism. As to such infants, it is a home and a school, not a prison. While no provision is made for a notice to those interested, if such there be, of the pendency of the proceeding, yet it would doubtless be proper for the examining officer, where it is practicable, before making the order, to require such notice, but the statute does not seem to require it as essential to the exercise of this power. As was said in *Prescott v. State*, 19 Ohio St. 188, where a similar question arose, 'neither the infant, nor any person who would in the absence of such commitment be entitled to his custody and services, will be without a remedy. The statute itself, as well as the provisions relating to *habeas corpus*, provides an adequate and complete remedy. In such a direct proceeding, the commitment does not operate to restrict the power of the court on *habeas corpus*, to inquire fully into the cause of the detention, and to determine upon the whole case, whether the parent is entitled to the custody of his child.

"The court below should have fully heard this case upon its merits, the commitment being in due form, and if the father was not a suitable person to have the care of these children, should have remanded them to the custody of defendants, until legally discharged. The authority of the State, *parens patriæ*, to assume the guardianship and education of neglected homeless children, as well as neglected orphans, is unquestioned. The institutions of public charity, for this purpose, in this State, are a subject of just pride to every citizen. The provisions of law under which these institutions are maintained, should receive such a construction as will not defeat their humane intention. So long as the management of these institutions is held to public account, and is

amenable to the courts, there need be no apprehension that personal rights will be infringed, especially where, as in this case, direct and ample remedies by *habeas corpus* are provided for the protection of the legal rights of parents and others."

In *State v. Ray*, New Hampshire Supreme Court, July 31, 1885, it was held, that a statute which authorizes a justice of the peace to commit to the industrial school a minor under the age of seventeen years, upon a complaint charging a crime with respect to which the jurisdiction of the justice only extends to requiring the accused to recognize in sureties for his appearance at court, is in conflict with article 15 of the Bill of Rights. The court said: "But the commitment and detention of the relator's sons is justified by the respondent upon the ground that the industrial school is not a prison, that the order of the commitment was not a sentence, and that their detention is not a punishment. The contention is, the industrial school is part of the school system of the State, and that the State as *parens patrie* may detain in the school such scholars as may need its discipline. If it is a privilege to be admitted a member of the school, it is a privilege limited to 'offenders against the laws.' At no time since its institution, in 1855, have its doors been open to the admission of any other class of scholars. Its advantages have not been offered to every minor under the age of seventeen years who might desire to enter, or whose parents or guardian might seek to place him there. The relator's sons were sent to the school, either because they had committed some crime or offense, or because the justice judged it to be for their 'interest or benefit' to be placed there. For whichever of these causes they were committed, the commitment was illegal. As already remarked, they have never been convicted of the crime of burglary; and they have not been tried nor had any opportunity to defend against any other charge. If the order for their commitment was made because the justice judged it to be for their 'interest and benefit,' the answer is that he has no authority by statute to commit them for that cause.

"Whenever a court or a justice may send a minor to the school he may fix the term during which he may be kept at the school at not less than one year nor extending beyond the age of twenty-one years, as the court or justice 'shall judge most for his true interest and benefit.' The limit of his stay or confinement in the school is determined by the consideration of what shall be 'most for his true interest and benefit,' but the statute does not confer upon the court or justice the power to send a minor to the school solely for the reason that the court or justice may be of opinion that it may be for the interest or benefit of the minor to be sent there. The original name of the school 'House of Reformation for Juvenile and Female Offenders against the Laws,' Laws of 1855, chap. 1660, indicated the character of the institution. The act provided that any boy under the age of eighteen years, or any female of any age, 'convicted of any offense known to the laws of this State and punishable by imprisonment other than such as may be punished by imprisonment for life,' might be sentenced to the house of reformation. Id. § 4. At no period in its history could be a person become an inmate of the institution unless, being within the prescribed age, he or she had been convicted of a crime or offense. The only exception is the unconstitutional provision inserted in the revision of 1867 (Gen. Stat.,

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chap. 269, § 14; Gen. Laws, chap. 287, § 14) authorizing a justice to send to the school a minor less than seventeen years of age when he shall have ordered to recognize for his appearance at the Supreme Court. We cannot ignore the fact that in the public estimation the school has always been regarded as a *quasi* penal institution, and the detention of its inmates or scholars as involuntary and constrained. The great purpose of the institution was the separation of youthful offenders from hardened criminals of mature years, in the hope of their ultimate reformation and of their becoming useful citizens. But the fact cannot be overlooked that the detention of the inmates is regarded to some extent in the nature of a punishment, with more or less of disgrace attached on that account. If the order committing a minor to the school is not a sentence but the substitute for a sentence, as claimed by the respondent, what is a substitute for a sentence but a sentence in and of itself? It is worthy of remark that the legislature has not undertaken to authorize the commitment of a minor to the industrial school upon the mere presentment of the grand jury.

"In this case the relator, the natural guardian of his sons, has been deprived of their care, nurture, education and custody against his consent, and without any trial or hearing to which he was a party, upon the ground, and only ground, that the justice found there was just cause to require them to appear at the Supreme Court to answer further. If he is not a suitable person to have the care and education of his children, that fact has not been found, nor does it appear that their education has been neglected. But how far he is entitled to be heard upon that question we do not decide. We have only alluded to the matter as showing what consequences may flow from the unlawful commitment of a minor to the school. Where the commitment is lawful, the loss by the parent of his custody of his child follows as one of the incidents for which there is no remedy, and perhaps in many instances, because of his unfitness, there ought to be none.

"It is further deserving of consideration, that the relator's sons, if indicted for the crime of which they were charged before the justice, cannot plead *autrefois convict*, although they may remain at the school the full term for which they were sentenced; and if their detention at the school is a punishment, they are liable to be punished twice for the same offense, in violation of the fundamental maxim, '*Nemo debet bis puniri*,' etc. Broom Leg. Max. 348.

"In coming to this conclusion we have not overlooked the decisions in other States. *Milwaukee Industrial School v. Supervisors Milwaukee County*, 40 Wis. 328; s. c., 28 Am. Rep. 702; *McLean County v. Humphreys*, 104 Ill. 378; *Petition of Ferrier*, 103 Ill. 367; s. c., 42 Am. Rep. 10; *Roth v. House of Refuge*, 31 Md. 329; *Ex parte Crouse*, 4 Whart. (Penn.) 9. In those cases the detention of abandoned, dependent or depraved children, in houses of refuge or in industrial or reform schools is upheld, upon the ground that the power of magistrates and county courts to commit, and of such institutions to detain such children is "of the same character of the jurisdiction exercised by the Court of Chancery over the persons and property of infants, having foundation in the prerogative of the crown, flowing from its general power and duty as *parens patrie* to protect those who have no other lawful protector. 2 Story

Eq. Jur. 1333. SHELDON, J., in *Petition of Ferrier, supra*. Or as stated in *Ex parte Orouse, supra*, 'May not the natural parents, when unequal to the task of education or unworthy of it, be superseded by the *parens patrie*, or common guardian of the community?' As to the soundness of the reasons given in these cases we have nothing to say. No one of them is an authority for the commitment of a minor charged with the commission of a crime to such an institution, without some kind of a trial and conviction.'

"*People v. Turner*, 55 Ill. 280; s. c., 8 Am. Rep. 645, was an application by the father for a writ of *habeas corpus* for the discharge from a reform school of his minor son. A statute of Illinois authorized the commitment to a reform school of children between six and sixteen years of age who are 'vagrants or destitute of proper parental care or are growing up in mendicancy, idleness or vice, to remain until reformed, or until the age of twenty-one years.' The re-lator's son, committed to the school under this statute, was discharged, the commitment being held not to have been for any criminal offense, and the statute was declared unconstitutional. His confinement was held to be imprisonment without due process of law. THORNTON, J., said: 'Such a restraint upon natural liberty is tyranny and oppression. * * * If a father confined or imprisoned his child for one year, the majesty of the law would frown upon the unnatural act, and every tender mother and kind father would rise up in arms against such monstrous inhumanity. Can the State, as *parens patrie*, exceed the power of the natural parent, except in punishing crime?'

"In *Commonwealth v. Horregan*, 127 Mass. 456, it was held that certain statutes relating to juvenile offenders so far as they purport to give inferior tribunals jurisdiction of offenses punishable by infamous punishment, are unconstitutional.

"A statute of Ohio authorized the grand jury, where a minor under the age of sixteen years is charged with crime, and the charge appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to the house of refuge and directed the court thereupon to order his commitment without trial by jury. The statute was declared constitutional. *Prescott v. State*, 19 Ohio St. 184; s. c., 2 Am. Rep. 388. The decision is put upon the ground that the case 'is neither a criminal prosecution nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed. The proceeding is purely statutory, and the commitment in cases like the present is not designed as a punishment for crime, but to place minors of the description and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrival at the age of majority. The institution to which they are committed is a school, not a prison, nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or penitentiary.'

"The statute further provided that in case the cause for the child's detention shall be inquired into by a proceeding in *habeas corpus* it shall be a sufficient return to the writ that he was committed to the guardianship of the di-

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rectory of the school, and that the period for his discharge had not arrived. It is intimated in the opinion of the court that it is questionable whether this provision can operate to restrict the power of the court, invested by the Constitution with jurisdiction in *habeas corpus*, from inquiring fully into the cause of the detention of a person restrained of his liberty.

"With due respect for the learned court which pronounced this opinion, we are not convinced of the soundness of its reasoning or conclusion. The proceedings by which the accused was adjudged a suitable person to be committed to the house of refuge were conducted in secret, without his knowledge or consent or that of his parent or guardian, with no opportunity to be represented by counsel, to be confronted with and cross-examine the witnesses for the prosecution, or to produce witnesses in his own behalf. The liberty of the minor during the term of his minority, which might be for a period of many years, was made to depend upon the deliberations of a secret tribunal. A judgment rendered upon such an *ex parte* hearing is as little calculated to command the respect of the community as the proceedings of the ancient court of the star chamber. And so far as the other cases cited are like the Ohio case in legal effect, we cannot follow them.

"Whether what has been called a trial in other jurisdictions in cases of this class is a trial within the meaning of our Constitution, and whether on any ground than that of a charge of crime, the legislature can authorize minors or persons of age to be committed to the industrial school without a trial by jury, if it were claimed, and without the consent of parent or other guardian, are questions on which we give no opinion.

"Persons poor and standing in need of relief may and must be cared for by the overseer of the poor, and may be sent to the alms-house for support; but their detention cannot be regarded as involuntary. They are in no sense deprived of their liberty without the judgment of their peers or against the law of the land. They are neither criminals nor charged with the commission of crime, and this provision of the Constitution was not understood by its framers, as restricting the power of the legislature to prescribe for the relief of the worthy poor. So children of profligate parents, or with vicious surroundings, may be taken from the custody of their natural guardians and committed to the guardianship of those who will properly care for their moral, intellectual and physical welfare. *Prims v. Foot*, ante, 52. But this is a power exercised by the State as *parens patriæ* in the welfare and interest of its citizens. 2 Story Eq. Jur., § 1333.

"The common law principle of reasonable necessity has an extensive constitutional operation—*Aldrich v. Wright*, 53 N. H. 398, 399, 400; s. c., 16 Am. Rep. 339; *Haley v. Coleord*, 59 N. H. 7, 8; s. c., 47 Am. Rep. 176; *Hopkins v. Dickson*, 59 N. H. 235; *Johnson v. Perry*, 56 Vt. 703; *State v. Morgan*, 59 N. H. 322, 325—and in many cases authorizes the restraint of an insane person. *Colby v. Jackson*, 12 N. H. 526; *Davis v. Merrill*, 47 N. H. 208; *O'Connor v. Bucklin*, 59 N. H. 589, 591; *Keleher v. Putman*, 60 Vt. 80; *Hinchman v. Richie*, Bright. (Penn.) 143; *Fletcher v. Fletcher*, 1 E. & E. 420; Buswell Insanity, §§ 19-24; even when he is committed to an asylum upon a defective process. *Shuttleworth's cases*, 9 A. &

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E. (N. S.) 651. But a magistrate's power to commit to the industrial school for detention during minority, every person, under the age of seventeen years, charged with, but not convicted of an offense punishable with imprisonment otherwise than for life' on the ground of the 'true interest and benefit' of the accused, does not come within any constitutional idea of reasonable necessity that has prevailed in this State. For his interest and benefit the magistrate might as well be authorized to send him to the State prison as to the industrial school, or any other penal institution."

PRAY V. STEBBINS.

(141 Mass 219.)

Marriage — tenancy by entireties.

Land conveyed to husband and wife is held in tenancy by entireties, unaffected by the statute enabling married women to take and hold property to their sole and separate use.*

ACTION to recover a room in a house. The opinion states the point. The plaintiff had judgment below.

W. P. Harding, for defendant.

W. Schofield, for plaintiff.

FIELD, J. The real property was conveyed to Orize K. Stebbins and Ann, his wife, their heirs and assigns, by deed dated October 31, 1868. At common law, both husband and wife were seised of the estate thus granted *per tout et non per my* as one person, and not as joint tenants or tenants in common. There could be no severance of such an estate by the act of either, and no partition of the land during their joint lives, and the survivor became sole seised of the entirety of the estate. *Pierce v. Chace*, 108 Mass. 254; *Wales v. Coffin*, 13 Allen, 213.

This tenancy by entireties is essentially a joint tenancy, modified by the common-law doctrine that husband and wife are one person, and was not changed by our statutes enacting that "conveyances and devises of lands made to two or more persons shall be construed to create estates in common and not in joint tenancy, unless," etc., because among other reasons, the statute expressly excepts convey-

* See note, 26 Am. Rep. 65.

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ances and devises to husband and wife. Pub. Stats., ch. 126, §§ 5, 6; Gen. Stats., ch. 89, §§ 13, 14; Rev. Stats., ch. 59, §§ 10, 11; *Wales v. Coffin*, *ubi supra*. See also *Shaw v. Hearsay*, 5 Mass. 521. This exception was repealed, and conveyances to husband and wife declared to create estates in common, by the statute of 1885, ch. 237; but this statute cannot affect the decision of this case, as it was passed after the plaintiff's rights had become vested, and his action had been brought.

The statutes which were enacted before this conveyance, to enable married women to take and hold property to their sole and separate use, do not in terms apply to an estate granted to husband and wife. Stats. 1845, ch. 208, § 3; 1855, ch. 304; 1857, ch. 249; Gen. Stats., ch. 108, § 1. Neither do the statutes on the same subject, enacted after this conveyance, and before the delivery of the lease to the plaintiff. Stat. 1874, ch. 184; Pub. Stats., ch. 147, § 1; Stat. 1884, ch. 301.

In *Pierce v. Chaco*, *ubi supra*, the deed to husband and wife was dated June 29, 1857, which was the day on which the statute of 1857, ch. 249, took effect. The deed was held to convey the common-law rights, although the effect of the statutes then in force relating to the separate property of married women was not noticed. In *Hayward v. Cain*, 110 Mass. 278, the deed was dated September 17, 1866, and recited a consideration paid by the husband and wife; but the grant was to the husband, and the court found that there was a resulting trust in favor of the wife in one-half of the land. The court said: "It is true that if the deed had been made to them jointly, as the master reports it was their understanding that it should be, it would have created an estate in them which would have been incapable of severance (*Wales v. Coffin*, 13 Allen, 213), because that is the legal construction of such a deed; and the circumstances of the purchase would not be admissible to show a different intent."

The statutes enabling a married woman to receive, hold, manage and dispose of real and personal property in the same manner as if she were sole, cannot we think be construed to apply to the estate by entireties of husband and wife, because other statutes in effect prevented this conveyance from being construed as creating a tenancy in common; and if a married woman held this estate as if she were sole, she would hold it as a tenant in common with her husband. At common law by a conveyance to A. and B., his wife,

and C., A. and B. took one-half and C. the other, but if under these statutes, B. is to take as if she were sole, A., B. and C. would each take a third, unless it were held that these statutes did not affect any rights except those between husband and wife. See *Mander v. Harris*, 27 Ch. Div. 166.

The provisions requiring the assent of the husband in writing to her conveyance, or his joining with her in the conveyance, or the consent of one of the judges, etc., in the Gen. Stats., ch. 108, § 3, which were in force when this conveyance was made, could not be held applicable to an estate by entireties in husband and wife, unless it be held that the husband's assent in writing to her conveyance, or the consent of one of the judges, etc., either enables her to convey the estate of both, or severs the wife's interest so that she can convey that in the same manner as if she held it as an ordinary joint tenant, or as a tenant in common with her husband; and there are no words that indicate any such intent on the part of the legislature. Such an intent is not to be assumed, when other provisions of the statutes prevent conveyances to husband and wife from being construed as creating estates in common, and when no authority is given to the husband to sever his tenancy by any conveyance which he can make, or to convey his own real property by an assent to the deed of his wife; and it was not the intention that the effect of his assenting to his wife's conveyance should be to convey any property which he held in his own right. If the wife held her interest in such a tenancy as this is to her sole and separate use, the tenancy would be destroyed, because the essential characteristic of the estate is that the interests of husband and wife in it cannot be separated; and construing the different provisions of the statutes in force when the plaintiff acquired his rights, we think it appears that the legislature intended that this peculiar tenancy should be preserved as it existed at common law.

The decisions in other States upon the effect of somewhat similar statutes turn more or less upon the particular terms of the statutes. For decisions that these statutes do not affect estates by entireties, see *Bertles v. Nunin*, 92 N. Y. 153; s. c., 44 Am. Rep. 361; *Marburg v. Cole*, 49 Md. 403; s. c., 33 Am. Rep. 266; *Hulett v. Inlow*, 57 Ind. 412; s. c., 26 Am. Rep. 64; *Hemingway v. Scales*, 42 Miss. 1; s. c., 2 Am. Rep. 586; *McCurdy v. Canning*, 64 Penn. St. 39; *Diver v. Diver*, 56 Penn. St. 106; *Fisher v. Provin*, 25 Mich. 347; *Robinson v. Eagle*, 29 Ark. 202; *McDuff v. Beau-*

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Champ, 50 Miss. 531; *Rogers v. Grider*, 1 Dana, 242; *Den v. Hurdénbergh*, 10 N. J. L. 42; s. c., 18 Am. Dec. 371. See also *contra*, *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Stigers*, 28 Iowa, 302; *Clark v. Clark*, 56 N. H. 105.

The rights of husband and wife in this estate must therefore be determined by the common law. By that law the right to control the possession of such an estate during their joint lives is in the husband, as it is when the wife is sole seised. "Neither could convey during their joint lives so as to bind the other, or defeat the right of the survivor to the whole estate," *Pierce v. Chace*, *ubi supra*; but subject to this limitation, the husband has the rights in it which are incident to his own property, and the rights which by the common law he acquires in the real property of his wife. He has, during coverture, the usufruct of all the real estate which his wife has in fee simple, fee tail, or for life. By the great weight of authority, he has the right to make a lease of an estate conveyed in fee to him and his wife, which will be good against the wife during coverture, and will fail only in the event of his wife surviving him. *Washburn v. Burns*, 5 Vroom. 18; *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Topping v. Sadler*, 5 Jones (N. C.), 357; *Fairchild v. Chastelleux*, 1 Barr 176; s. c., 44 Am Dec. 117; *Pollok v. Kelly*, 6 Ir. C. L. 367, 375; *Bertles v. Nunan*, *ubi supra*; *Wyckoff v. Gardner*, Spencer, 556; *Ames v. Norman*, 4 Sneed, 683; *Ward v. Ward*, 14 Ch. Div. 506; *Godfrey v. Bryan*, 14 Ch. Div. 516.

[Minor matters omitted.]

Judgment on the verdict.

PRATT V. AMERICAN BELL TELEPHONE COMPANY.

(141 Mass. 285.)

Statute — stock-jobbing — corporate coupons payable in stock.

A corporation issued notes with interest coupons, payable to bearer three years from date, and containing this provision: "The holder hereof may" on a day named, "or" on another day named, six months later, "and at no other time, exchange this note, coupons not due being attached, for the stock of the company at par, that is for one share." At a subsequent meeting of the corporation, before the first date named in the note, it was voted to increase the capital stock, and the stockholders were given the right to take shares

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at par therein, in the proportion of one new share to three old shares. At the time the notes were issued, there was in the hands of trustees, a sufficient amount of full paid stock of the corporation, subject to its control and not otherwise appropriated, to enable it to perform its contract to deliver stock for the notes. *Held*, that a bill in equity, filed on the day when the above-named meeting was held, by a holder of said notes, to enable him to share on equitable terms in the benefit of the issue of the additional shares, could not be maintained.

BILL to obtain shares of stock. The opinion states the case. The bill was dismissed below.

W. G. Russell and C. A. Prince, for plaintiff.

E. R. Hoar and J. E. Hudson, for defendants.

GARDNER, J. The plaintiff in this bill in equity, which was filed on March 27, 1883, held certain notes with coupons attached, payable to the bearer thereof in three years after their date, issued by the defendant company on October 20, 1882. Each note contained this provision: "The holder thereof may, on the 20th of April, 1884, or on the 20th of October, 1884, and at no other time, exchange this note, coupons not due being attached, for the stock of the company at par, that is for one share." At a meeting of the stockholders of the company, held March 27, 1883, it was voted to increase the capital stock, and the stockholders were given the right to take shares at par therein, in the proportion of one new share to three old shares held by them respectively.

The bill alleges that at the time the convertible notes were issued, there was in the hands of the defendant trustees a sufficient amount of full paid stock of the company, subject to its control and not otherwise appropriated, to enable it to perform its contract to deliver stock for said notes, and that there was no other way in which the company could lawfully perform its contract than by the delivery of said shares so held by said trustees; that the vote to issue the notes and the issuing them was an appropriation of said stock to the fulfillment of said contract; and that the contract became in substance a contract to deliver said stock in exchange for said notes, and charged said stock in the hands of the trustees with a trust for the benefit of the holders of said notes. The plaintiff, as the holder of a large number of these convertible notes, contends

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that he had the right to share on equitable terms in the benefit of the issue of said additional shares.

The first inquiry respects the construction of the contract between the parties. This is in writing, and is embraced in the convertible note which the plaintiff holds against the company. It will be seen that this writing contains no reference to the shares of stock held by the trustees when the note was issued. There is no agreement therein that the option which was given the holder should apply to any particular shares of stock of the corporation. No express trust is created therein in relation to any shares of the company's stock. In all these respects the contract is bald and naked.

The plaintiff contends that the words "stock of the company," as used in the contract, have reference to the shares then held in trust for the company, and that the contract is to be construed as a contract to sell a specified portion of said shares; that inasmuch as the parties must be presumed to have intended that which was legal rather than illegal, their contract will be construed accordingly; that the only possible legal contract was a contract to sell shares then owned by the company, and hence the presumption is that the company intended to contract to sell a given number of the shares of which it was the owner. The presumption is, without doubt, that the parties must have intended that which was legal rather than illegal, and their contract will be construed accordingly. But the presumption that the company intended to contract to sell a given number of the shares of which it was the owner when the contract was entered into does not necessarily follow.

The stock-jobbing act (Pub. Stats., ch. 78, § 6) declares a contract for the sale or transfer of the stock of corporations like that of the defendant company to be void, unless the party contracting to sell or transfer the same is, at the time of making the contract, the owner, or has the control thereof. It is a well-recognized rule, that the adjudged construction of a statute, by a foreign State or country where it was enacted, is to be given to it when it is afterward passed by the legislature of another State or country. *Commonwealth v. Hartnett*, 3 Gray, 450. Before the stock-jobbing act of New York was enacted here, in substantially the same form as there, the courts of New York had decided, that if a person contracting to deliver stock at a future day, had stock in his possession

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or control when he made the contract, he was not obliged to keep the stock, or to deliver that identical stock, but that the contract could be performed by the delivery of any other shares of the same stock. *Frost v. Clarkson*, 7 Cow. 24. A contract to sell shares owned by the company at the time the contract was made was not, as the plaintiff argues, the only possible legal contract. The party promising to deliver stock at a future time must under the statute be the owner or have the control of sufficient stock to fulfil his contract at the time the contract is made. It is not to sell the same shares, because the contract can be performed by the delivery of any other shares of the same stock. The presumption contended for by the plaintiff does not logically follow, that the company intended to contract to sell a given number of the shares of which it was the owner. The stock-jobbing act did not entitle the bearer of the convertible notes to receive any specific shares. Nor did it compel the company to tie up its shares, to keep them idle and useless during the three years, to await the uncertain option of the holder of the notes. The presumption seems to be contrary to that contended for by the plaintiff. The statute created no duty and no obligation on the part of the company in relation to the stock held by its trustees when this contract was made. It created no express or implied trust that the stock should be held to respond to the demands of the holders of these notes.

The plaintiff argues, that until the option was declared, the company was bound to keep itself in a position to carry out either of the promises contained in the notes, at the election of the holder. The contract does not make this requirement. This case is not one where the option may be declared at any time, one where the company would be bound to hold itself in readiness to respond to the demand of the plaintiff every day and hour. It specifies two days when the exchange shall be made, and carefully states that at no other times but upon those designated days can it be done.

The plaintiff argues that the contract could not have been intended to refer to shares to be thereafter issued, since it was made by the directors of the company, and that they had no power to make issues of stock, that power belonging to the stockholders of the company (Pub. Stata., ch. 106, § 34), and such new issue, if made under the Pub. Stata., ch. 105, § 20, could only be disposed of by offering it to previous stockholders. These propositions may

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be conceded. The statutes have carefully provided for the disposition of new stock, and have marked out the manner in which it shall be distributed. The contract could not have been intended to refer to such stock, upon the presumption that the parties must have intended that which is legal rather than illegal.

The plaintiff contends that the contract could not have intended to refer to stock to be purchased by the company; and that it was not competent for the company to deal in its own shares by buying and selling them in the market. There may have been other ways in which provision could have been made by the company to comply with the requirement of this contract. But is it material to inquire whether the company, at the time of making the contract, had then the means of possessing itself of the shares of its own stock, in order to deliver them in the future? Was not that question postponed to the time when they would be demanded, and the company be required, upon the option of the holder of the note, to deliver them? "The mode in which one party to a bargain shall enable himself to do what he has agreed to, is no concern of the other party, and is no part of the contract." *Bacon v. Parker*, 137 Mass. 309. The contract was legal; when it was entered into the company had one method of fulfilling it, and this was sufficient. The holders of the notes must rest content until the time arrives when they can exercise their option, and demand the stock guaranteed to them.

In giving a construction to the contract contained in these convertible notes, as bearing upon the question whether the shares of stock held by the company when the contract was made became attached to and part thereof, the evidence in the case relating to the issue of notes of similar character in 1880 or 1881 is of some effect in showing the understanding of the parties as to this contract. The notes then issued contained the express provision that the holders thereof should have the right to convert them into any new issue of stock prior to a given date. The plaintiff held notes of this first issue, and knew of the right attached to them, and he also knew that the convertible notes of the issue we are now considering contained no such right. Both parties understood that the contract, by its written terms, gave the holder no such right as was contained in the first issue of notes. We do not think that we are empowered to write into the contract terms which neither party understood, at the making thereof, were any part of the same.

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This case is not like that of *Price v. Minot*, 107 Mass. 49, where the undertaking of the defendant was in relation to three hundred shares of stock which he then held, and which he promised to hold for the plaintiff until the happening of a future and expected event, in the meantime, or a part thereof, the profit or dividend from the shares to belong to the plaintiff. In the case at bar, there was no appropriation of any specified stock to be used in fulfilling the contract named in the notes. At the time the notes were issued the plaintiff was not a stockholder under the contract, nor was he such when the new stock was issued. The contract he had made obligated the company to pay him a certain sum of money at the expiration of three years, with interest, as appeared by the coupons attached to the notes, or to exchange his notes for the stock of the company upon certain dates. During the time the notes were running, he was in no sense a stockholder, nor do we find, upon the facts, that he was an equitable stockholder. He had no vested right or title in any particular stock. His rights and interest as a stockholder of the company were postponed to the time when he should make his option and demand his stock. Pending this time, the contract gave him the right to payment of the coupons attached to the notes, and nothing more. Whether he would ever acquire interest in the stock of the company under his contract was conditional, and depended upon the event of his option, and until that was exercised he had no claim to any stock of the company. His contract did not attach to it the stock which the company held when the notes were issued. The convertible notes were independent of any particular, specified shares of stock, and the company held these shares free from any obligation expressed or implied in the contract. Each stood separate and alone, free from any rights or interests attaching the one to the other. The company could legally treat this stock as it saw fit. It could hold, sell, hypothecate, or lend it. Being subject to no trust, belonging absolutely to the company, it could hold and dispose of the same at its pleasure.

We do not find that the contract contained in these convertible notes gave the plaintiff any equitable interest in the stock of the company, held by trustees for its benefit and disposal; and that in holding said stock, neither the trustees who held it for the company nor the company were clothed with any trust for the plaintiff in relation thereto.

Decree dismissing the bill affirmed.

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ROBERTSON V. COLEMAN.

(41 Mass. 281.)

Negotiable instrument — check to false order — bona fide holder.

A., representing himself to be C. B., took stolen goods to the defendant, representing himself to be the owner, and ordering him to sell them for him. The defendant relying on those representations, sold the goods, and gave him in payment his check payable to the order of C. B. A. indorsed the check in blank by that name, and transferred it for value to the plaintiff. The defendant discovering the fraud stopped payment of the check. *Held*, that the plaintiff could recover the amount thereof. (*See note, p. 472.*)

ACTION on a check. The opinion states the case. The plaintiff had judgment below.

S. J. Thomas and C. S. Sampson, for defendants.

C. F. Kittredge, for plaintiff.

FIELD, J. The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name. The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, and whose name they believed to be Charles Barney, and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check. The plaintiff received this check for a valuable consideration, in good faith, from the same person, whom he believed to be Charles Barney, and who indorsed the check by that name. It appears that the defendants thought the person to whom they gave the check was Charles Barney, of Swanzey, a person in existence, but it does not appear that they thought so from any representations made by the person to whom they gave the check, although this perhaps is immaterial. It is clear from these facts, that although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check

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to this person or his order, and he has ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations, the plaintiff took it in good faith and for value. See *Samuel v. Cheney*, 135 Mass. 278; s. c., 46 Am. Rep. 467; *Edmunds v. Merchants' Transportation Co.*, 135 Mass. 283.

Judgment on the verdict.

NOTE BY THE REPORTER.—See *Kohn v. Watkins*, 26 Kans. 691; s. c., 40 Am. Rep. 336.

In *Blodgett v. Jackson*, 40 N. H. 21, it was held that when a note is made payable to a firm, and no such firm exists, the person to whom such note was given may assume such firm name, and indorse said note in the name of such firm, and it will be good in the hands of an innocent holder.

To the same effect is *Ort v. Fowler*, 31 Kans. 478.

In *Forbes v. Eppy*, 21 Ohio St. 182, it was said: "It appears from the agreed statement of facts, that all the parties (except Mara) to the transactions stated, acted in good faith and in the usual mode of doing such business. But Mara, for the purpose of defrauding the general government out of its revenues, and shielding himself from detection, assumed the name of 'Charles Clark.' And, in that assumed name, he bought the nutmegs from Wreford, Dillon & Co., in Canada, and smuggled them into the United States, at Detroit; and in that name shipped them from Detroit to Cochran, Holmes & Co., at Cincinnati, to be sold by them on commission, and asked for return of sales and proceeds. Cochran, Holmes & Co. made return of sales to him, and having indorsed this bill to 'Charles Clark,' remitted it to Detroit to that address. Mara received it, and afterward indorsing it in the name of 'Charles Clark,' delivered it for a valuable consideration to Wreford, Dillon & Co., from whom the plaintiffs received it. It is also conceded that Wreford, Dillon & Co. had no knowledge of Mara's fraud, or that his name of Charles Clark was assumed.

"Now the judgment below must be reversed, if either of the following propositions can be maintained, to wit:

"1. That the legal title to this bill passed from Cochran, Holmes & Co. to Wreford, Dillon & Co., by the indorsement of the former to Mara under his assumed name of 'Charles Clark,' and by his subsequent indorsement by the same name to Wreford, Dillon & Co.; or

"2. That Cochran, Holmes & Co. are estopped, as against the plaintiffs, from denying that the title so passed.

"The first proposition we deem it unnecessary to resolve, as an affirmative solution of the second is decisive of this case.

"We cannot however dismiss the case without remarking, that by the weight of English cases, and by some American decisions, the indorsement by Mara, of the name 'Charles Clark,' upon this bill, at the time he delivered it to Wreford, Dillon & Co., was a forgery. Byles Bills [262]; (6th ed. of Bayley Bills, 572); Rus & Ry. 209. 1 Leach, 94 and 172; East P. C. 940-959; 2 Para. Bills, 585. and cases cited in notes. Nor can it be doubted, as a general rule, that the title to a bill cannot be transferred by a forged indorsement.

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"It is well settled however both in England and America, that a note or bill knowingly made, drawn or indorsed to a fictitious person, is to be regarded as made, drawn or indorsed to bearer, and may be transferred by delivery merely. Byles Bills [61]; 3 T. R. 174, 182, 481; 4 E. D. Smith, 88; Story Bills, 56 and 200, and notes.

"True this is not such a case; nor is this a case where a bill was intended to be indorsed to a particular person, and the person intended was not in existence, as if, for instance, he were dead, and that fact was not known, and a person, other than the one intended to take, fraudulently indorsed the bill over by using the name of such fictitious person. Such last mentioned indorsement would be a forgery, and ineffectual to transfer title. The title in such case would remain in the first indorser.

"But in this case the person intended as indorser by Cochran, Holmes & Co. was a real person, in actual existence, but designated by a false or assumed name, of which last fact they were ignorant. It matters not whether they were induced to adopt that name, through the fraud of Mara, or by mistake. The person so intended by such false or assumed name, subsequently, by using the same name, indorsed and delivered the bill to an innocent purchaser.

"It is questionable whether this last indorsement be a forgery. 22 Iowa, 379. But if it be, it may still be doubted whether it falls within the general rule above stated. 22 Iowa, 379.

"If however the legal title did not pass from Cochran, Holmes & Co because there was no 'Charles Clark' to take under their indorsement; or to Wreford, Dillon & Co. because Mara's indorsement was a forgery; still the second proposition, above stated, must be resolved, viz.: are the defendants or Cochran, Holmes & Co. estopped from denying the plaintiffs' title?

"The principle of estoppel in *pais* has a very extended and just application in the law of bills and notes, the doctrines of which are designed to give credit and circulation to negotiable securities, and to that end throws its protection around the honest and fair holders thereof.' 'See 14 Ind. 382; 114 Eng. C. L. 426, 432; 15 N. Y. 575; 5 Cow. 688, 711; 22 Iowa, 404; 1 Pars. Notes and Bills, 560, 589, 244; Story Notes, § 80; Edw. Bills, 250; and *Phillips v. Thurn*, 114 E. C. L. 694.

"Cochran, Holmes & Co. having indorsed this bill to 'Charles Clark,' delivered it to William Mara. And if facts are more significant than words, they intended to indorse it to Mara, as they certainly intended to deliver it to him. By the transfer of the bill, their purpose was to pay for the nutmegs, and they intended to make payment to the person from whom they received them. Mara was that person. They were ignorant of his true name, and supposed it to be Clark. He had deceived them as to his name, but not as to his identity. He was in fact the identical person from whom they had received the nutmegs, and for whom they intended the bill, when they indorsed it to 'Charles Clark.'

"Suppose Cochran, Holmes & Co., in the presence of Wreford, Dillon & Co., had indorsed the bill to 'Charles Clark,' and delivered it to William Mara, saying this is the amount due you on account of your nutmegs, and

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Mara had then and there indorsed and delivered it to Wreford, Dillon & Co. The case would have been on all fours with the present; and we think that under such circumstances, Wreford, Dillon & Co. might well have relied upon the conduct of Cochran, Holmes & Co. as a representation that Mara's name was Clark, although they had no interest in the transaction between them. It must be kept in mind that Cochran, Holmes & Co. thus put in circulation a negotiable security, and invited the world to give it credit. We cannot resist the conclusion, that the indorsement by Cochran, Holmes & Co., to Charles Clark, and their delivery as part of the same transaction, must be regarded as an affirmation to all persons not otherwise informed, that there was such a person as Charles Clark, and that Mara was that person."

BOWDITCH V. NEW ENGLAND MUTUAL LIFE INSURANCE CO.

(141 Mass. 202.)

Corporation — prohibiting officer to borrow from — title to bonds pledged for loan.

If an officer of a corporation, forbidden by statute to borrow money from it, so borrows and pledges as security the bonds of an innocent third person as his own, the corporation acquires title thereto, if it acted in good faith, although the loan was also in violation of a rule of the directors.

ACTION to recover the value of bonds. The opinion states the case.

W. G. Russell & G. Putnam, for plaintiffs.

W. C. Endicott & A. D. Foster, for defendant.

MORTON, C. J. This is an action of tort in the nature of trover, to recover the value of certain negotiable coupon bonds held by the defendant as collected security for several promissory notes signed by Sidney W. Burgess.

Benjamin F. Burgess held the bonds in dispute as trustee under the will of Lysander A. Ellis, deceased. At several times he applied to the defendant for loans of money upon the notes of his son Sidney, offering these bonds as collateral security. These applications were submitted to the finance committee, a committee charged with the duty of investing the funds of the defendant company, which passed votes authorizing the several loans, and these votes were afterward approved by the directors. Thereupon Benjamin

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F. Burgess delivered the bonds to the defendant, and received the amounts of the loans.

Benjamin F. Burgess was a member of the finance committee, and was present at all the meetings, but neither spoke nor voted upon the question of allowing said application. The other members of the committee knew that the loans, though in the name of Sidney W. Burgess, were for the benefit of said Benjamin F. Burgess, or his firm, composed of himself and Walter Burgess another son.

At the time said loans were made and said bonds received, Benjamin F. Burgess and his firm were in good financial standing, and the members of the finance committee, except said Burgess, made the loans and took the security without any knowledge or suspicion that said securities were not the property of said Benjamin F. Burgess, or of said firm, and in the belief that said loans were abundantly secured, and were wise and prudent investments of the funds of the company. The presiding justice of the Superior Court, who heard the case without a jury, has found that although the loans were in form loans upon the notes of Sidney W. Burgess, Benjamin F. Burgess was in fact the borrower of the funds of the corporation; and that said Benjamin F. Burgess took no part, on behalf of the corporation, in the transactions in which said loans were made.

For the purposes of this discussion, we treat the case as if the loans had been made in form and directly to Benjamin F. Burgess. We do not understand the plaintiffs to contend that the defendant is affected with the knowledge of Burgess of the fraud in the transfer of the bonds in dispute. Upon this point, the case of *Innerarity v. Merchant's National Bank*, 139 Mass. 332; s. c., 52 Am. Rep. 760, is conclusive against them. But they contend that the contract between Burgess and the defendant was illegal and void; and that the defendant cannot retain the bonds which were given as security for the void contract.

This is the vital question in the case. The statute provides that "no member of a committee or officer of a domestic insurance company, who is charged with the duty of investing its funds, shall borrow the same, or be surety for such loans to others, or directly or indirectly be liable for money borrowed of the company." Pub. Stats., ch. 119, § 47.

It is a rule universally accepted that if a statute prohibits a contract in the sense of making it unlawful for any one to enter into it, such a contract, if made, is wholly void, and cannot be enforced.

But it is often a difficult question to determine whether a statute forbidding an act to be done, or enjoining the mode of doing it, is prohibitory, so as to make any contract in violation of it absolutely void, or whether it is directory in its purpose, and does not necessarily invalidate the contract. Though it may be impossible to formulate a rule which will reconcile all the adjudications, yet the decisions recognize a clear distinction between these two classes of cases. There is a large class of cases, both in this country and in England, in which statutes have enacted, in substance, that goods should only be sold in certain measures, or in a certain manner, or after being inspected and branded by public officers; and it has been held that contracts of sale which do not meet the requirements of such statutes are absolutely void. The purpose of such statutes is to protect the buyer from the imposition of the seller, a purpose which would be wholly thwarted unless the contracts are held void, and therefore the intention of the legislature to make them void is inferred. *Miller v. Post*, 1 Allen, 434, and cases cited; *Libbey v. Downey*, 5 Allen, 299; *Sawyer v. Smith*, 109 Mass. 220, and cases cited. Benjamin on Sales, §§ 530 *et seq.*

So statutes prohibiting any work on the Lord's day, except work of necessity or charity, have been construed to make entirely void any contract made in violation of their provisions. On the other hand, there are numerous cases where statutes forbid certain acts to be done, and in a sense forbid certain contracts to be made, and yet it is held that contracts made in contravention of the statutes are not void. When usurious contracts were forbidden by our laws, under a penalty of forfeiting threefold the amount of interest reserved or taken, the act of making such a contract was illegal, but the contract was not void. The imposition of the defined penalty showed that the legislature did not intend that the contract should be wholly void, as this would be imposing an added penalty. *Merrell v. McIntire*, 13 Gray, 157.

In *Leonard v. Andrews*, 106 Mass. 435; s. c., 6 Am. Rep. 346, it was held that the provisions of the internal revenue laws of the United States, prohibiting any person from carrying on the business of wholesale dealers in merchandise until they should have paid the special tax therein provided for, did not invalidate sales made by persons who failed to comply with the statute, or prevent them from recovering the price of the goods sold. The same point was decided in *Aiken v. Blaisdell*, 41 Vt. 653.

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The Revised Statutes of the United States respecting National banks provide that a bank shall not lend to any one person, corporation or firm, a sum exceeding one-tenth part of the capital stock actually paid in, and that National banks shall not take real estate as collateral security except for debts previously contracted; and it has been repeatedly held that contracts made in contravention of the statute are not void. *Gold Mining Co. v. National Bank*, 96 U. S. 640; *National Bank v. Matthews*, 98 U. S. 621; *National Bank v. Whitney*, 103 U. S. 99; *Reynolds v. Crawfordsville National Bank*, 112 U. S. 405.

Where the officers of a savings bank invest its funds in a manner forbidden by statute, such illegal action of the officers does not impair the validity of the investment. *Holden v. Upton*, 134 Mass. 177.

Many other cases might be cited, in which it has been held that contracts made in violation of the provisions of statutes are not void, upon the ground that the statutes are intended merely to be directory to the officers or persons to whom they are addressed, and not to be conditions precedent to the validity of contracts made in reference to them. Each statute must be judged by itself as a whole, regard being had not only to its language, but to the objects and purposes for which it was enacted. If the statute does not declare a contract made in violation of it to be void, and if it is not necessary to hold the contract void in order to accomplish the purposes of the statute, the inference is that it was intended to be directory, and not prohibitory of the contract.

The statute we are considering does not in terms prohibit the corporation from lending money to its officers, or declare that such contracts shall be void. It is directed to the officers, and by its terms seems intended to prescribe rules to regulate the duty of the officers to the corporation and its members. It does not say that the corporation shall not lend, but that the officers shall not borrow. In the words of Lord MANFIELD, in *Browning v. Morris*, 2 Cowp. 790, 793, the statute itself "has marked the criminal." It is designed to forbid officers, who are charged with the duty of investing the funds of the corporation, borrowing of themselves, and thus to prevent the risk of the funds being invested by them, under the promptings of self-interest, upon insufficient security. In other words, the purpose is to protect the corporation and the policy-holders from the dishonesty or self-interest of the officers.

It is intended as a shield to the corporation. To construe it as making the promises of the officers who borrow money in violation of its provisions void, would defeat the main purpose of its enactment, and would visit the consequences of the unlawful act of the officers, not upon themselves, but upon the corporation for whose protection the statute was made. It would require a plain expression of legislative intention to lead us to such a construction.

The plaintiffs contend that unless the contract is held void, the statute is rendered nugatory. But this is not so. If the investing committee loans to an officer in violation of the duty imposed by the statute upon it, all who participate in the act would be liable for all losses occasioned thereby, and thus the main purpose of protecting the policy-holders would be subserved. The plaintiffs rely much upon the case of *Albert v. Savings Bank*, 2 Md. 159. But that case, if not overruled, is very much taken as an authority by the more recent case of *Lester v. Howard Bank*, 33 Md. 558; s. c., 3 Am. Rep. 211, which supports the views of the defendant.

For the reasons stated, we are of opinion that the notes signed by Sidney W. Burgess are valid contracts, which can be enforced by the corporation. This being so, we see no ground upon which it can be held that the defendant is not entitled to hold the bonds which it received in good faith as collateral security for the notes. The bonds were negotiable or transferable by delivery, and the defendant took them for a valuable consideration and without fraud. The plaintiffs contend that they were not taken "in the usual course of business," because the contract of borrowing by Burgess was illegal. The rule is often stated to be, that in order to hold such property against the true owner, the transferee must have taken it for a valuable consideration, in good faith, in the usual course of business, without notice of any want of title on the part of the party negotiating it. It is quite as often stated to be, that the transferee must have taken it *bona fide* and for value. Both have the same meaning, and the defendant is within either statement of the rule. It gave value for the bonds; it took them in good faith, in the ordinary and usual course of a transaction of loaning money and taking collateral security, and without any notice, actual or constructive, that Burgess was not the owner with full power to transfer them. As to the defendant, the loan was legal; and the fact that Burgess was violating his duty in borrowing the money does not take the transaction of pledging the bonds

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as collateral security out of the usual course of business, or tend to excite any suspicion in the defendant that the bonds were not his property.

We do not consider the fact of any consequence, that the loans to Burgess were made in violation of the rule of the directors. This could not have more effect than a violation of the statute. Such a rule is a private regulation of the directors, and its violation or evasion could not affect the validity of the loans.

Judgment for the defendant.

WOODBURY v. WOODBURY.

(141 Mass. 289.)

Fraud — construction — physician and patient.

In an action by an administrator to recover money given by his intestate to the defendant, on the ground of undue influence, there was evidence that the donor was a woman eighty-four years of age, sick much of the time, weak in mind and memory, and broken down; that the gift was of a large portion of the donor's estate; that the defendant, not a relative, was her physician, and attended her frequently; that he had charge of all her affairs; and was her only adviser; that he was consulted by the donor as to employing or discharging servants or nurses, and as to her domestic affairs; that she dressed according to his advice; that she relied upon him for direction in all her affairs; that the gift was made to him without consultation with any one, that the fact of the gift having been made was kept secret by him until after her death; and that when the donor's relatives visited her, he kept away. *Held*, that the question of undue influence was properly submitted to the jury. (*See note*, p. 482.)

ACTION for money had and received. The opinion states the case. The plaintiff had judgment below.

W. D. Northend & C. G. Saunders, for defendant.

E. T. Burley, for plaintiff.

GARDNER, J. This is an action for money had and received, by which the plaintiff seeks to recover \$2,861, given as a gift *inter vivos* by the plaintiff's intestate to the defendant—between whom there existed confidential relations, not only of physician and patient,

but also of adviser and friend, and of agent and principal — upon the ground that the gift was obtained by the undue influence of the defendant.

The defendant first requested the court to instruct the jury that there was no evidence in the case which would warrant them in finding that the defendant solicited the gift, or used any undue influence to obtain the same. The court declined to give this instruction. The evidence bearing upon the question of undue influence, introduced at the trial, is reported in full in the defendant's bill of exceptions. It tended to show that the donor was eighty-four years old, and was sick much of the time, weak in mind and memory, and was broken down; that the gift was of a large portion of the donor's estate; that the defendant, who was not a relative of the donor, attended her as a physician, and visited her every day or twice a week; that he had charge of all her affairs and was her only adviser; that he was consulted by the donor as to employing or discharging her servants or nurses, and as to domestic affairs, and that she dressed according to his advice; that she relied upon him for direction in all her affairs; that the gift was made to the defendant without consultation with any one, and that the fact of the gift having been made was kept secret by him until after her death. It was also in evidence, that when the donor's relatives visited her, the defendant remained away. We cannot say as matter of law, that there was no evidence in the case which would warrant the jury in finding that the defendant solicited the gift, or that he used any undue influence to obtain the same. The evidence reported bearing upon the physical and mental condition of the alleged donor, her age, the acts, doings and relations through several years of the defendant toward her, the transactions between them at and about the time of the alleged gift, and his general conduct toward her and her relatives, we are satisfied, raises such a presumption of fact, that if believed by the jury, it would justify them in finding that the defendant in some form solicited the gift, and used undue influence to obtain it. *Howe v. Howe*, 99 Mass. 88. If undue influence must be established by affirmative testimony, with the burden of proof upon the party alleging it, it is thus established when facts are proved from which it results as an unavoidable inference. *Tyler v. Gardiner*, 35 N. Y. 559. "In some cases, undue influence will be inferred from the nature of the transaction alone; in others from the nature of the transaction.

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and the exercise of occasional, or habitual influence." *Sears v. Shafer*, 6 N. Y. 268. Upon the evidence which is reported, we think that the ruling prayed for should not have been given; and that the court was fully justified in declining to rule as requested.

The jury were instructed as follows: "When a fiduciary or confidential relation is established between a donor and a donee, a case arises for watchfulness on the part of those who have to pass on the validity of the gift, to see that this confidence has not been abused by the exercise of undue influence. The mere existence of such a confidential relation does not, as matter of law, operate to bar the right of the beneficiary to receive such a bounty. If the donor was at the time of sound mind, and clearly understood the transaction, and exercised a free will in the act, under no restraint or undue influence, such gift will be supported. But the law views transactions of this kind between such parties with some jealousy, and if at the time of the gift, the donor's mind was enfeebled by age and disease, even though not to the extent of producing mental unsoundness, and the donor acted without independent and disinterested advice, and in the presence of donee, and such gift was of a large portion of all the donor's estate, and operated substantially to deprive those having a natural claim to the donor's bounty of all benefit from the donor's estate, these circumstances, if proved, and unexplained would authorize a jury to find the gift void, through undue influence, without proof of specific acts and conduct of the donee. But where the donee is himself a witness, and other evidence is introduced, as in the present case, the whole matter is for the determination of the jury, and the general burden is on the plaintiff, taking all the evidence, natural presumptions and inferences together to establish the proposition of undue influence."

The first part of the instructions given will find support in the current of English and American decisions. *Rhodes v. Bate*, L. R., 1 Ch. 252; *Mitchell v. Homfray*, 8 Q. B. D. 583; *Yost v. Laughran*, 49 Mo. 594; *Garvin v. Williams*, 44 Mo. 465; *Cadwalader v. West*, 48 Mo. 483; *In re Welsh*, 1 Redf. 239; *Wilson's Appeal*, 99 Penn. St. 545; *Todd v. Grove*, 33 Md. 188, and the numerous cases therein cited.

At the trial, the jury had before them the fact that the defendant, at the time the gift was made to him, was the physician of the plaintiff's intestate, her friend, adviser and financial agent; and under many of the cases cited, this relation would create a suspicion

of undue influence, which might be considered by the jury, without any direct proof of such influence. *Drake's Appeal*, 45 Conn. 9. In cases of probate of wills, it has been held, that where a stranger, charged with the exercise of undue influence, having no claims from relationship, derives a considerable benefit under the will, evidence of direct influence used at its making is not required. *Boyd v. Boyd*, 66 Penn. St. 283. It is often difficult to show by direct proof the undue influence, and direct evidence of the actual exercise of such influence can hardly be expected. Oftentimes the means of keeping the influence out of sight are many and easy of application, and yet the result may be clearly apparent. *Delafield v. Parish*, 25 N. Y. 9, 96. The fact of the influence exerted is more often gathered from all the circumstances surrounding the donor — his health, age and mental condition, how far he was dependent upon and subject to the control of the person benefited, the opportunity which the donee had to exercise his influence, and the disposition of the donor to be subject to it. In addition, the fact of influence by the donee over the donor having been established, it is not necessary to show by absolute evidence that this was exerted by the donee at the time the gift was made. *Sears v. Shaffer*, *ubi supra*.

Undue influence must be exercised in relation to the gift made, and not as to other transactions, in order to invalidate a gift thus obtained. But if the jury find from the evidence, that at or about the time when the gift was made the alleged donor was, in other important particulars, so under the influence of the person receiving the gift, that as to them, he was not a free agent, but was acting under undue influence, the circumstances may be such as fairly to warrant the conclusion, from the absence of any evidence bearing directly upon acts done when the alleged gift was actually made, that in relation to that also the same undue influence was exerted. *Boyse v. Rossborough*, 6 H. L. Cas. 2.

[Minor points omitted.]

Exceptions overruled.

NOTE BY THE REPORTER.—See *Audenreid's Appeal*, 89 Penn. St. 114; a. c., 33 Am. Rep. 731, and note, 736.

Mitchell v. Homfray, cited in that note, and in the principal case, reached the Court of Appeal, 8 Q. B. Div. 537. Selborne, L. C., said:

"When this case was before this court on a previous occasion, certain questions to be left to the jury were suggested, and their effect may be stated as follows: Was the advance of £800 a gift? Was there an undue influence,

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and when was it removed? Was there an intention of abiding by the advance if it was a gift? Was the signature of the testatrix obtained by fraud? This is the substance of the questions put to the jury, and both parties were content that these questions alone should be asked. We have been pressed during the argument with the suggestion, that the jury ought to have been asked whether the testatrix was aware that the gift made to the defendant was impeachable. If it was wished that this question should be put, it ought to have been mentioned at the trial, and we ought to hold that both parties were prepared to pass it over. No doubt the questions as to the state of the mind of the testatrix were very important. There was no evidence that she actually knew that the gift was impeachable; but she was dead at the time of the trial; and the findings of the jury imply all that ought to be inferred in the defendant's favor. They have found that the relationship of physician and patient had come to an end long before the death of the testatrix, and that she intentionally abode by what she had done. It must be held that whether she knew or not that she had power to retract the gift, she was determined to abide by her acts. This is not a case of mere acquiescence; she determined that she would not undo what she had done. This being the state of facts, I do not think that any authority goes the length of saying that her representatives, after her death, can do that which, if she had lived, she herself would not have done. In the present case it is admitted that the testatrix had no independent advice. In *Rhodes v. Bate*, L. R., 1 Ch. 252, it was laid down in clear terms that in order to uphold a gift made to a person standing in a confidential relation, the donor must have had competent and independent advice in conferring it. This is undoubtedly the rule, so long as the confidential relation exists; but it is not laid down in *Rhodes v. Bate*, *supra*, that advice of that kind is necessary when the confidential relation has come to an end, and the donor is no longer subject to its influence. Not very much authority exists from which we can derive assistance. In *Dent v. Bennett*, 4 My. & Cr. 275, the lord chancellor remarks that 'there is an absence of all evidence of the testator having at any time recognized, or in any manner given any proof of approval of the agreement, or of any consciousness of its existence.' That was a case in which the plaintiff, as executor, sought to set aside an alleged agreement by his testator to pay a large sum of money to the defendant, who was a surgeon and apothecary. The words of the lord chancellor do not go very far, but they show that he thought that evidence of an intention to recognize a gift might be material. In *Wright v. Vanderplank*, 8 D. M. & G. 146, TURNER, L. J., used language which was not quite like that employed by him in *Rhodes v. Bate*, L. R., 1 Ch. 257. He seems to have considered in *Wright v. Vanderplank*, *supra*, that a gift from a child to a parent will be good when the parental influence is disproved, or that influence has ceased. I know of no difference between solicitor and child on the one hand, and parent and child on the other. TURNER, L. J., said that he was not of opinion that a positive act was necessary to show that the donor had elected to abide by the gift; all that was required was proof of a fixed, deliberate and unbiased determination that the transaction should not be impeached. This was the view of TURNER, L. J.; in *Wright v. Vanderplank*, *supra*. In that case the evidence

was strong in favor of upholding the gift. The daughter appears to have been aware that the transaction was impeachable, but she elected to abide by the gift to her father, and it was held that after her death the gift could not be set aside. Her acquiescence afforded a defense to a suit to impeach it. Of the other cases cited before us *In re Holmes' Estate*, 8 Giff. 337, seems somewhat in point. That was a case of an alleged gift to a solicitor from his client, and the vice-chancellor expressed an opinion that when the influence which a solicitor may be supposed to exert over his client has been removed, the solicitor may become the object of his client's bounty, and may receive from him a gift which will be valid both at law and in equity. I think that these authorities support the conclusion at which we have arrived, and upon the findings of the jury the judgment ought not to be disturbed."

BAGGALLAY, L. J., said: "It is found that the advance of £800 was a gift and not a loan. I have heard nothing to make me differ from the findings of the jury on this head. It was admitted that there was no independent advice of any kind at the time when the gift was made. I think that this circumstance will prove to be immaterial. The proposition has been repeatedly laid down in equity that gifts made to persons standing in a confidential relation cannot be upheld. According to this doctrine the gift to the defendant may have been originally voidable, but the relation of patient and physician had ceased for some years before the donor's death. This circumstance gets rid of a difficulty which might otherwise have existed. The relation had ceased three years before the death of the testatrix, and the jury have found that she had elected to abide by it. It is impossible to avoid giving some effect to the word "intentionally" in the question, to which the jury have given an affirmative answer. I do not propose to go at length into questions of detail. The testatrix was determined to abide by the gift, and did abide by it. None of the cases are against our holding that the gift cannot be impeached. If the transaction was not formally ratified it was at all events adopted, and for three years before her death the testatrix kept to her determination not to impeach it."

BRAMWELL, L. J. concurred.

BLACKINTON V. BLACKINTON.

(141 Mass. 432.)

Marriage — conflict of laws — jurisdiction.

A man and a woman, residing in Massachusetts, were married there. Subsequently the husband left his wife, without cause, and went to another State, of which he became a citizen. The wife, continuing in Massachusetts, filed in the Probate Court a petition for separate maintenance, notice of which was served upon her husband in the State where he resided. No attachment of his property was made. *Held*, that the court had jurisdiction of the husband's property in Massachusetts, and of his person, if found therein.

Blackinton v. Blackinton.

PETITION for separate maintenance of wife. The head-note states the case. The petitioner prevailed below.

N. B. Bryant, for respondent.

G. W. McConnell, for petitioner.

HOLMES, J. If the petitioner were proceeding for a divorce, there is no doubt that the court would possess and exercise jurisdiction, notwithstanding the husband's change of domicile. Pub. Stats., ch. 146, §§ 4, 5; *Harteur v. Harteur*, 14 Pick. 181, 185; s. c., 25 Am. Dec. 372; *Brett v. Brett*, 5 Metc. 233, 235; *Shaw v. Shaw*, 98 Mass. 158; *Cheever v. Wilson*, 9 Wall. 108, 124. See *Niboyet v. Niboyet*, 4 Prob. Div. 1. The present proceeding contemplates a continuance of the marriage status, instead of its dissolution. But the ground on which it proceeds is a breach of the duties incident to that status—in this case desertion, that is a separation of home and interests—without the petitioner's fault; and the same considerations which are stated in *Harteur v. Harteur*, *ubi supra*, for declining to treat the domicile of the wife as following that of the husband when she seeks a divorce, equally apply when she seeks protection and separate maintenance under the Pub. Stats., ch. 147, § 33. The statute is general in its terms, and we know of no principle which would warrant our confining its operation to cases where the deserting husband retains his domicile within the State.

Assuming that the Probate Court has jurisdiction of the subject matter in such a case, we are of opinion that its right to proceed is not confined to cases where personal service can be made upon the respondent within the State. The jurisdiction in divorce is not confined to such cases. *Burlen v. Shannon*, 115 Mass. 438. And whatever may be thought of decisions like *People v. Baker*, 76 N. Y. 78; s. c., 32 Am. Rep. 274, and *Doughty v. Doughty*, 28 N. J. Eq. 581, we do not understand any one to deny that divorces granted against absent defendants, after such notice as the laws of the State prescribe, are valid within the limits of the State granting them.

In like manner, so far as the petitioner seeks a decree protecting her person, and giving her the custody of her child now living in this Commonwealth, we have no doubt that the statute confers power upon the Probate Court to make it. The question whether it also confers power to order the payment of money for mainte-

nance is more difficult, but in the opinion of a majority of the court, must be answered in the same way. It has been intimated that authority to decree a divorce against a defendant domiciled elsewhere, and not appearing does not carry with it authority to decree alimony. *Beard v. Beard*, 21 Ind. 321. But the statute under which the petitioner proceeds recognizes no such distinction. It does not contemplate a jurisdiction for one of its purposes and a want of jurisdiction for another, and we see no reason why it should be limited beyond its words.

The whole proceeding is for the regulation of a status. The incidents of that status are various — some concerning the person, some concerning the support of the petitioner or her child. The order to pay money is not founded on an isolated obligation, as in a case of contract or tort, but upon a duty which is one of those incidents. The status, considered as a whole, is subject to regulation here, although it involves relations with another not here, because such regulation is necessary rightly to order the daily life, and to secure the comfort and support of the party rightfully living within the jurisdiction. It is quite true that these considerations may not suffice to give the decree extra-territorial force, and that in general, courts do not willingly pass decrees, unless they think that other courts at least ought to respect them. But that is not the final test. We think that the statute was intended to authorize such decrees as that appealed from, and tacitly to adopt the rules, as to service expressly laid down for divorce. Pub. Stats., ch. 146, § 9. We do not see any sufficient ground for denying the power of the legislature to pass the act. We are therefore of opinion that the decree was within the power of the court, and can be carried out against the defendant's property within the jurisdiction, and against his person if he be found here.

Decree affirmed.

Smith v. Oakes.

SMITH V. OAKES.

(41 Mass. 461.)

Ship and shipping—master's liability for seaman's wages.

The master of a vessel is personally liable for the wages of a seaman earned while he is master, although the seaman was hired by a former master.

ACTION for wages. The opinion states the point. The plaintiff had judgment below.

H. N. Sheldon, for defendant.

F. S. Hesselting, for plaintiff.

C. ALLEN, J. The original master having fallen sick and left the ship during the voyage, the first question for determination is, whether the defendant, in the absence of an express contract to that effect, and merely by virtue of his relation as a new and substituted master for the remainder of the same voyage, is held bound by law upon an implied contract to pay to the seamen their stipulated wages, so as to be personally liable in an action at law for their wages earned after his accession to the office, and we are of opinion that he is. The liability rests on the peculiar relation which the master sustains to the seamen, the owners and the ship, and not upon general principles of agency. The agreement in the shipping articles is with the master, or whosoever shall go for master, and the crew agree to be obedient to the lawful commands of the master, or of any person who shall lawfully succeed him. U. S. Rev. Stats., § 4612, Sched. A.

Wages already earned do not become due at once upon a change of master, and unless the new master is liable, the remedy by an action against the master after the wages fall due would often be practically worthless, as the original master might be dead, or in a distant port. The new master represents the owners and the ship, and has charge of the funds from which the wages are usually and naturally paid. He knows, or has the means of knowing exactly what the wages will be, and can easily protect himself from risk. It is not necessary to determine now whether his personal liability extends so far as to include wages earned before he took command.

But when a new master takes upon himself the unfinished portion of a voyage, it is no hardship upon him to hold him bound by law to assume the contract for the payment of such wages as may thereafter be earned by the seamen under his command, who on their part are bound by contract to obey him; unless indeed he does something to show that such is not his intention. The case of *Fitzsimmons v. Baxter*, 3 Daly, 81, is closely in point; and while other decisions are not very explicit upon this question, the prevailing opinion of courts and text-writers has been in the same direction. See *Bishop v. Shepherd*, 23 Pick. 492; *Temple v. Turner*, 123 Mass. 125; *Farrel v. M'Clea*, 1 Dall. 392; *Bray v. The Atlanta*, Bee, 48; *Wysham v. Rossen*, 11 Johns. 72; *Flanders Shipping*, §§ 331 *et seq.*; *Curtis Merchant Seamen*, 327. An action at law is a proper remedy. *Leon v. Galceran*, 11 Wall. 185, 188. U. S. Rev. Stats., § 4547.

The payments made by the defendant from the money of the ship were properly applied to the wages earned before he took command. It is not as if he had made the payments from his own money. The ship and the owners were responsible to the seamen; the ship's money was paid to them.

Exceptions overruled.

OSGOOD V. BLISS.

(141 Mass. 474.)

Marriage — ante-nuptial agreement — wife's ante-nuptial will.

An ante nuptial agreement by an intended husband that the woman should hold her property separately and independently, and that the marriage should not revoke her will previously made, nor affect her right to change it subsequently, renders such will valid.

A PPEAL from probate. The head-note shows the point.

E. P. Goulding & H. F. Harris, for appellee.

H. C. Hartwell & F. H. Dewey, Jr., for appellants.

W. ALLEN, J. No question is made that the agreement contained a power to Mr. Bliss to appoint by will, and that a will exe-

Osgood v. Bliss.

cuted by her after the marriage would have been a good execution of the power, and would have operated as such, and not as a will; and that to make it effective, it would be necessary that it should be allowed in the Probate Court. See *Osgood v. Breed*, 12 Mass. 525; *Ela v. Edwards*, 16 Gray, 91; *Heath v. Withington*, 6 Oush. 497; *Holman v. Perry*, 4 Metc. 492; *Parker v. Parker*, 11 Cush. 519.

Whether a power of appointment in an ante-nuptial contract can be executed before as well as after the marriage depends upon the terms and construction of the agreement. In this case, the power to appoint by will before the marriage is clearly given. The provision that the marriage shall not work the revocation of the will executed prior to it shows that it was intended that the power might be executed before the marriage. The agreement and the will bear the same date, and were both executed on the day before the marriage, and the agreement provided, in effect, that the will should be a good execution of the power. Even if the will had been made before the agreement, and not referred to in it, and the power had been general to appoint by will, the pre-existing will might have been a good execution of the power. *Boyes v. Cook*, 14 Ch. Div. 53; *Logan v. Bell*, 1 O. B. 872. The question is whether the execution of the power by an appointment by will before the marriage was revoked by the marriage.

The difference between a will and an appointment by will in this case may seem very slight, but there is the material practical difference between the two, that a married woman may make an appointment by will by the common law, but cannot make a will except as authorized by recent statutes. The theoretical distinction is that a will concerns the estate of the testator, and an appointment under a power that of the donor of the power. It is the exercise of a power of designation as to the estate of the donor, and is the same when given or reserved to the wife, as to her own estate, in an ante-nuptial contract between the parties intending marriage. *Ela v. Edwards*, *ubi supra*; *Bradish v. Gibbs*, 3 Johns. Ch. 523. Such a power can be given to be executed when sole or married, and can be executed by a married woman according to its terms, by deed, will, or otherwise. There can be no reason for the distinction that the execution, when sole, of a power to appoint by deed or will when sole or married, if by will should be revoked by marriage, but if by deed should not be revoked. The will operates in the same manner as the deed does, as the execution of a power,

not as the disposition of an estate. It was at first held that the will could not be proved in the spiritual court, but treated in equity as an appointment. The difference between the execution of a power by will and by deed is that the former must be by an instrument allowed in the Probate Court as executed in the manner of a will, and which is to be construed by the rules applicable to the construction of wills, and such an appointment is always revocable; the latter must be by an instrument under seal, and may be irrevocable.

The reason given for holding that marriage is deemed to be a revocation of a woman's will — that she thereby divests herself of the power of revoking it, and destroys the ambulatory character necessary to a will — does not apply to an appointment by will.

The woman has the same authority to execute the power of revocation and appointment when married as when sole. The nature, and not the form of the instrument, determines whether at common law or under statutes, it is a will of which marriage is a revocation. So are the authorities.

In *Hodsdon v. Staple*, 2 T. R. 684, there was an ante-nuptial agreement between the parties to a marriage, by which the woman had a power of appointment of her real estate by will. Before the marriage she made a will in favor of the man. The husband survived her, and the question arose between their respective heirs in an action of ejectment. The case was decided in favor of the heirs of the wife, on the ground that the legal title remained in her, and did not pass by the will. Lord KENYON, C. J., said that while the will of a *feme sole* is revoked by marriage, "it is equally clear that where an estate is limited to uses, and a power is given to a *feme covert* before marriage to declare those uses, such limitations of uses may take effect; and this is the rule even in a court of law." ASHHURST, J., expressed a doubt whether marriage would not revoke the will, but said that that question did not arise in the case, as the power did not give authority to appoint before marriage. *Hodsdon v. Lloyd*, 2 Bro. Ch. 534, was in equity, and the question of the validity of the same will as an execution of the power was directly in issue. It was held invalid, because the power was limited to a will made after marriage, and not upon the ground that the marriage was a revocation of the appointment.

In *Taylor v. Rains*, 7 Mod. 148, there was an agreement between persons intending marriage, which gave the woman power to appoint in writing or by will. She made a will before the marriage.

W — v. W —

It was held that though the will could not be allowed in the spiritual court, it was a good appointment in equity.

Logan v. Bell, *ubi supra*, was a case of a marriage settlement, which gave the woman a power of appointment by deed, will, or codicil. After the settlement, but before the marriage, she made a codicil to her will, referring to the power. It was held a valid execution of the power, and not revoked by the marriage. TINDAL, C. J., said: "Nor is there any doubt that supposing the power in the settlement to extend to a codicil made after the settlement and before the marriage, the appointment by the codicil was not revoked by the marriage." There seems therefore to be no doubt that a power to appoint by a codicil made before marriage may, by proper words, lawfully be conferred, and may if duly executed take effect notwithstanding the subsequent marriage.

McMahon v. Allen, 4 E. D. Smith, 519, was a case where a power in a marriage settlement to appoint by writing or by a last will or codicil contained these words: "The existing will and codicil to be deemed an appointment until the making of some other appointment." It was held that the will and codicil was a valid execution of the power, which was not revoked by the marriage. See also *Lanf's Appeal*, 95 Penn. St. 279; s. c., 40 Am. Rep. 646.

The will, so far as it is in execution of the power of appointment contained in the agreement referred to, should be allowed; but there should be a qualified or limited allowance, as in *Holman v. Perry*, and *Heath v. Withington*, *ubi supra*.

Ordered accordingly.

W — v. W —

(141 Mass. 485.)

Marriage — divorce — cruelty — masturbation.

The practice of masturbation by a husband in the presence of his wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is not "cruel and abusive treatment," warranting a divorce.

J. F. Wakefield, for libellant.

No counsel appeared for the libellee.

Rea v. Simmons.

HOLMES, J. The single question reserved is whether the practice of masturbation by a husband in the presence of his wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is "cruel and abusive treatment" within the Pub. Stats., ch. 146, § 1.

We will assume, although it is not found as a fact, that the libellee knew how his conduct worked upon his wife, and we fully agree that in general, foresight of a consequence of one's act has the same effect upon liability for producing it as intent to produce that consequence. *Commonwealth v. Pierce*, 138 Mass. 165, 179; a. c., 52 Am. Rep. 264; *Goodnow v. Shattuck*, 136 Mass. 323, 225.

But the actual intent and purpose with which an act is done may be of importance when the question is not one of liability, but of dissolving the marriage tie. Certainly they may be made so by statute. The words "cruel and abusive treatment" seem to import on the face conduct directed toward the other party, and with a malevolent motive. Without deciding that a case could not be imagined which would fall within the meaning of the words without such a motive, it is enough to say that purely self-regarding conduct, not forced upon even the knowledge of the wife otherwise than by the usual intimacy of matrimony, does not constitute the offense, merely because its folly, its disgusting character, or its wickedness disturbs her nerves or conscience, and thus affects her health.

Libel dismissed.

REA V. SIMMONS.

(141 Mass. 541.)

Negligence — loss of clothes of tailor's customer while trying on.

The plaintiff went to the defendant's tailor shop to try on a suit of clothes which he had ordered, and was directed by a clerk to a closet in which to make the change. He came out from the closet to a mirror in an adjoining room, leaving his other clothes in the closet. While so absent his pocket-book, watch and some other articles were stolen from the clothes. No direct negligence on the part of the defendant was shown, but there was evidence of experienced tailors that it was customary to provide such dressing rooms for customers. *Held*, that defendant was not liable. (See note, p. 493.)

ACTION to recover the value of personal property. The opinion states the case. The defendant had judgment below.

Rea v. Simmons.

W. R. Richards, for plaintiff.

J. O. Teale, for defendants.

GARDNER, J. This case is reported to this court, "for its opinion upon the question of law involved." No specific questions of law are stated in the report, nor does it appear that any were raised at the trial. The issue between the parties was upon the first count. The facts material to this issue were found in favor of the defendants. The decision of the presiding judge upon the evidence was conclusive. It does not appear from the report that there was any error of law in the finding and judgment of the Superior Court. *Fox v. Adams Express Co.*, 116 Mass. 293; *Clark v. Burns*, 118 Mass. 275; s. c., 19 Am. Rep. 456.

Judgment affirmed.

NOTE BY THE REPORTER. — This curious case is not without a parallel. In *McCullin v. Reed*, Pennsylvania Common Pleas, June 11, 1885, 16 Week. Notes of Cases, 287, a tailor was held liable for a watch and chain stolen from the plaintiff's clothing while he was being fitted with new clothing in his shop. On the trial plaintiff testified: "I wanted to buy a coat and pants. I was introduced to a salesman who showed me some clothes, and showed me a compartment in which to try them on. It was one of six. The compartments were not separated by doors but by curtains, and so was the entry from the main store. I was not directed to any particular compartment, but took the last one from the entrance. I was taken to the end of the entry between the six compartments. I changed my clothes and left my vest hanging in the compartment, as I wanted the coat to be fitted small enough to fit without a vest. I met the salesman outside the set of compartments, and went to a glass thirty or forty feet away, and there he fitted pants and coat. I suppose it took four minutes. I told him I would take them and went to change them, as they had been chalked. On entering the compartment, I noticed that watch-chain was not to be seen; looked again and found my watch was gone. Went at once and told salesman, Mr. Rahl, that was stolen, and told him to notify those at the door so that they could stop party if not out. I then went back, changed clothes, came out and found salesman, Mr. Rahl, with a gentleman who was introduced as a member of the firm. He asked about loss, and I told him. While speaking, another salesman came up, and seeing us talking, asked what was the matter, and on being told, said: 'It must have been stolen by a customer whom he had shown into the set of compartments shortly before, within a couple of minutes before.' He said two gentlemen had come in, one of whom wanted a pair of pantaloons. He described them fully, so that I could give a full description to detective. He gave the man a pair and showed him in, his friend waiting outside. He thought it rather peculiar that the man had only been in there about half a minute,

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when he came out and threw the pantaloons down and said they were not what he wanted, and said to his friend, 'We will go to Wanamaker's,' or something like that. He said he thought it was peculiar the man had been able to try on the pantaloons in that space of time. Mr. Benn was the salesman who showed them in; he gave me his card. The men had hurried out of the store. Very few people there. In the compartments there was no warning that the place was insecure; no notice not to leave valuables posted, and none given by the salesman." The court charged the jury as follows: "It is the duty of the defendants in this case to provide a safe place, and if they do not do so they are guilty of negligence and should be held responsible. The plaintiff might leave what he liked in the closet. If you think the plaintiff was guilty of negligence (and there is nothing to show that he was), you may find for the defendants. The plaintiff is entitled to recover the value of the goods lost and any expense he was put to in his endeavor to recover them." The jury found for the plaintiff, and this was affirmed.

DUDLEY v. BRIGGS.

(141 Mass. 582.)

Slander of business — prevention of publication of directory.

The plaintiff in his declaration alleged that he was and had been engaged for many years in compiling and publishing bi-annual county directories, at great labor and expense, and had acquired a large advertising patronage therefor, and a large list of subscribers; that he had prepared to and would have published the same in 1885, but that by reason of the false and fraudulent statement of the defendant that he had gone out of the business and disparaging his business, he had been prevented from doing so, and the defendant had published such a directory, to his injury; but he did not allege that he had been deprived of the benefit of any contract or property, or that the defendant published the directory as the plaintiffs', nor any infringement of copyright. *Held*, no cause of action.

TORT. The declaration was as follows: "And the plaintiff says that he is, and has been for many years, a compiler and publisher of directories of cities, towns and counties in this Commonwealth and elsewhere; that by the care, attention, skill and faithfulness and after great labor and expense, he had acquired a large number of subscribers among business men and other people, throughout the cities and towns of Bristol county, and elsewhere in this Commonwealth, for 'The Bristol County Directory,' which the plaintiff has compiled and published biennially for many years,

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and until the acts and doings of the defendant hereinafter complained of; that at great labor and expense, he had acquired a large and valuable list of advertisers in his said directory, from whom, as well as from the said subscribers to said directory, he obtained a large income, and would have continued to do so, but for the acts and doings of the defendant hereinafter alleged and set forth.

“And the plaintiff says that according to his usual and ordinary custom in the compilation and publication of the said ‘The Bristol County Directory,’ he would have compiled and published the same in this year, A. D. 1885, and he made his preparations therefor, but he says that the defendant and his canvassers, and other servants and agents, in order to injure the plaintiff, and to deprive him of the opportunity of compiling and publishing said directory for said year of 1885, and thereafterward, and receiving the gains and profits therefrom, and to secure the same to the defendant, together with all the gains and profits arising therefrom, and otherwise to injure the plaintiff and get gain, profit and advantage to the defendant, knowingly and willfully, falsely and fraudulently pretended and represented to many persons, and particularly to the plaintiff’s patrons, the advertisers in said directory and the subscribers thereto throughout said Bristol county, that the plaintiff had gone out of the business of compiling and publishing said directory, that the plaintiff had sold out said business to the defendant, that the said canvassers and the defendant’s other servants and agents were compiling the materials for the plaintiff’s directory, the same as formerly, and other false and fraudulent representations then and there made, of which the plaintiff is not yet fully informed, and thereby deceitfully and wrongfully induced the plaintiff’s said patrons, advertisers and subscribers, in and throughout said Bristol county, to give to the defendant their advertisements and subscriptions, and to pay him instead of the plaintiff therefor.

“Whereas, in truth and in fact, the said representations were wholly false and untrue; the plaintiff had neither gone out of the business of compiling and publishing the said directory, as he had done for years before, nor had he sold out to the defendant, nor had he any intention of doing so; nor were the defendant and his canvassers, and other agents and servants, compiling the said directory the same as formerly or for the plaintiff; all of which the defendant, as well as his said canvassers and other servants and

agents well knew. And the defendant did knowingly, wrongfully, injuriously and deceitfully compile and publish the said 'The Bristol County Directory,' for the year A. D. 1885, and vend and sell the same to the plaintiff's patrons, advertisers, subscribers and other persons, as aforesaid. And the plaintiff says that thereby he has been prevented from compiling, publishing and selling his said directory this year, A. D. 1885, as he has always done heretofore; that he has lost the great gains and profits which he would otherwise have made and received from the sale thereof, and from advertisers in and subscribers to said directory, and has been put to great loss and expense in preparing for said compilation and publication, till he learned of the defendant's said acts and doings, and thereby he will be hereafter prevented from compiling and publishing said directory except at an increased expense and with diminished profits."

The defendant demurred to the declaration, on the ground that it did not set forth a legal cause of action.

The Superior Court sustained the demurrer; and ordered judgment for the defendant. The plaintiff appealed to this court.

J. C. Coombs & N. U. Walker, for defendant.

S. H. Dudley, for plaintiff.

FIELD, J. The plaintiff in his declaration does not allege that by the acts of the defendant he has been deprived of the benefit of any contract he had made, or of any property in existence and in his possession, or that the defendant published his directory for 1885 as a directory prepared and published by the plaintiff; and does not bring his case within such decisions as *Lumley v. Gye*, 2 El. & Bl. 216; *Marsh v. Billings*, 7 Cush. 322; s. c., 54 Am. Dec. 723; *Thomson v. Winchester*, 19 Pick. 214; s. c., 31 Am. Dec. 135; *Blofeld v. Payne*, 4 B. & Ad. 410; *Morison v. Salmon*, 2 M. & G. 385; *Sykes v. Sykes*, 3 B. & C. 541.

He does not allege that he had any copyright in the previous publications which the publication of the defendant infringed; and the courts of the Commonwealth have no jurisdiction over infringements of copyright. If each publication of a directory by the plaintiff every two years was a separate publication, then the plaintiff's declaration amounts to this—that he intended to publish a directory for 1885, whereby he expected to make profits, but by

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reason of the acts of the defendant, he abandoned such an intention, and lost the profits he otherwise would have made. But an intention in the mind of the plaintiff to compile and publish a directory is not property, and the abandonment of such an intention is not a loss of property. *Bradley v. Fuller*, 118 Mass. 239.

An attempt has been made to bring this case within what is called slander of goods, manufactured and sold by another. See *Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R., 9 Ex. 218. This implies that the plaintiff was engaged in the business of making and selling directories, and that the defendant made statements disparaging the plaintiff's business. We think that the declaration does not show that the business of the plaintiff in publishing a new directory every two years was a continuous business. The directory to be published in 1885 was to be a new compilation and publication. From the nature of the book perhaps this could not well be otherwise. New subscribers and new advertisements were to be obtained. We have been shown no case where it has been held that a false statement that the plaintiff had gone out of business, or sold out his business to the defendant, was an actionable slander of a person in his trade; but upon this we express no opinion. It may be said that such statements tend to injure a man in his business, because they tend to prevent customers from resorting to him for trade, and to injure the value of the good will of his business. However this may be the difficulty is in attaching good will as a valuable thing to the publication every two years of a new directory. Such a directory could be published by anybody. It is perhaps a question of degree whether the publication by the plaintiff had been so frequent and regular that there can be said to be a good will that would be protected in law. There is no allegation of any continuing contract, express or implied, of subscribing for, or advertising in the directories, as a publication periodically issued; there is no allegation of any place of business to which customers resorted to purchase directories. Until the plaintiff had entered upon the compilation of the directory for 1885, we do not think that there was any business of publishing a directory for 1885 carried on by the plaintiff, or any thing that for example could have been sold as a going concern by an assignee in insolvency, if the plaintiff had become an insolvent debtor. The cases upon liability for wrongful interference with the business of another are largely collected in *Walker v. Cronin*, 107 Mass. 555;

but in that case there was an actual business, with the carrying on of which the defendant wrongfully interfered. The declaration in this case indeed alleges that the plaintiff made his preparations for compiling and publishing a directory for 1885, but it does not allege what those preparations were, or that they were any thing valuable. The averment that he "has been put to great loss and expense in preparing for said compilation and publication," near the end of the declaration, appears to be a part of the damages.

The plaintiff cites *Swan v. Tappan*, 5 Cush. 104; but there the declaration was held insufficient, because there was no allegation of special damage. The declaration in the present case cannot well be distinguished in this respect from the declaration in *Swan v. Tappan*, but we do not deem it necessary to reconsider the decision in that case on this point. There the plaintiff was actually engaged in selling his book, which had already been printed and put upon the market, and the action was the ordinary action for the malicious disparagement of the goods of another, manufactured and kept for sale.

The plaintiff relies upon *Benton v. Pratt*, 2 Wend. 385; s. c., 20 Am. Dec. 623, which perhaps may be considered as an extreme case. See *Randall v. Haselton*, 12 Allen, 412, 417. In *Benton v. Pratt*, Seagraves and Wilson, at Allentown, had orally agreed to purchase of the plaintiff two hundred hogs, at the market price, if delivered within three or four weeks, and they had not been previously supplied; and "about the time for the delivery," the plaintiff was proceeding with his drove of hogs to Allentown for the purpose of delivering to them two hundred hogs. The defendant, by his falsehood and deceit, intentionally prevented the performance of this contract, by persuading Seagraves and Wilson that the plaintiff was not intending to drive his hogs to Allentown, whereby they were induced to buy the hogs of the defendant, instead of buying the hogs of the plaintiff, as they otherwise would have done. The court says that it was "not material whether the contract of the plaintiff with Seagraves and Wilson was binding upon them or not;" but the agreement, if there was an agreement, although not in writing, was an actual offer by Seagraves and Wilson, not revoked, and which they would have performed, and the plaintiff was in the actual possession of the property which Seagraves and Wilson had offered to buy, and was actually proceeding to deliver this property to them, in accordance with their offer.

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The fatal objection to the present case is, that it is entirely problematical whether the plaintiff would actually have published a directory if the defendant had not made the fraudulent misrepresentations alleged. The plaintiff abandoned his intention to compile and publish a directory in consequence of the defendant's acts; but this, upon the principles stated in *Bradley v. Fuller, ubi supra*, and the cases therein cited, is not sufficient to support an action.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

LOTT V. NEW ORLEANS CITY AND LAKE RAILROAD COMPANY.

(51 La. Ann. 357.)

Negligence — infants riding on street cars.

The driver of a feed car running on a street railway, allowed boys to ride free on the platform at his side. They becoming troublesome, he ordered them to get off, slackening the mule to a walk, but not touching or threatening them. Thereupon one pushed the other, a newsboy eleven years old, and he fell under the car and was killed. *Held*, that the company was not liable.

ACTION of damages for death by negligence. The opinion states the case. The defendant had judgment below.

L. L. Levy and W. W. Handlin, for appellants.

Braughn, Buck & Dinkelspiel and W. O. Hart, for appellee.

BERMUDEZ, C. J. The plaintiffs appeal from a judgment rejecting their demand in damages, for injuries sustained by their minor son, who was run over by one of the defendants' cars, and who died in consequence, the same day. The accident is charged to have occurred by the gross negligence of the driver.

The record shows that on the morning of September 12, 1882, at about nine o'clock, a feed car belonging to the company, in charge

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of a driver, was coming down Magazine street in this city, when three boys, two of whom had been in the habit of doing so, jumped on the platform in front, taking positions, one Martin, on the right and the other two, Lott and Babe, on the left of the driver.

They commenced "skylarking," and became so troublesome that the driver cautioned them to keep quiet. They stopped a while, but began anew, when slowing up the car, the driver told them to get off, since they would not behave themselves, using neither threat nor force.

The car was going slow, the mule was on a walk.

The boy Babe, who was on the left side, nearer the driver and on the right of Lott or Harry, who himself was standing on the extreme of the platform, then told him, "Hurry up, hurry up, get off Harry," giving him a push.

Losing his balance under the shove, Harry grabbed the staunch-
eon, but imperfectly. Letting it go, he fell, slipping on the side of the car, part of his body getting under and being run over by the vehicle.

Bruised and mangled, the boy was taken up and carried to his home, where after much suffering and lingering, he died some nine hours later the same day.

It appears that Lott and Martin were good boys, smart and active. They were pets of the driver, who occasionally allowed them to jump and ride on his car, the feed car, for he seems to have driven no other.

They were so alert and experienced that sometimes they would jump on and off the platform before the driver would know any thing about it. Lott was about eleven years old and a newsboy.

The fact that he was pushed by Babe is established by his own declarations made on his bed of suffering, by the testimony of Martin, his friend; by that of Sullivan, the driver, and somewhat by that of Babe himself, the reckless companion.

There is nothing to show that the driver touched, threw off, or threatened the boy, or that he was asked to stop fully, or that he had any reasonable ground to believe, when he told the boys to get off, that any of them would be injured in doing so.

The only thing the driver did was to tell them to get off. It was to enable them to do so securely, that he slackened his car to a mule walk.

It is highly probable that had he been asked to stop, the driver would have done so. The fact is that the boys did not ask him to

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stop and did not wait till he had stopped altogether. Martin jumped on one side, Babe pushed Lott or Harry and jumped on the other; Harry fell, was hurt and died. Had he not been pushed, he would have jumped as his friends did, and he would have been no more hurt than they were.

It is manifest that the company never designed the platform on the feed car to be used for the transportation of passengers; that when it intrusted Sullivan with the driving of the car, it gave him only the authority necessary to take it from one place to another; that they did not give him the power of admitting passengers on it; that it was patent that the car was not one for passengers, from its form and structure, which was that of a large box with no side openings and no inside seat; that permission by the driver to persons to ride on the platform was unwarranted; that those who thus got on and rode with him were intruders, as concerned the company, and thus primarily at fault.

It is likewise apparent that the boy Harry fell and was hurt, not because the driver ordered all the boys off, or had not stopped, but because when he was about getting off, he was pushed by his companion Babe, who like him, was also an intruder.

Had Harry not been pushed, it is indubitable that he would have got off unhurt, not only because he was smart, active, alert, expert at it, as all newsboys notoriously are — but because the car had almost stopped. His companions got off unhurt.

Considering the age of the boy — eleven years — his experience, his occupation, his known agility, we think he was well able to take proper care of himself, and can be held to the same accountability as a person of full discretion might be under similar circumstances.

The rules which govern as to mere children do not apply to minors who have attained to years of discretion. *Shearman & Redfield*, 55-56; *McMahon v. Mayor*, 33 N. Y. 642.

In order to hold the company liable, it must appear that the injury was occasioned by the negligence of the driver in the exercise of the functions in which he was employed; that it was the natural and probable result of the conductor's order, such a consequence as he might and ought to have reasonably foreseen at the time; that he had done or omitted an act which was something contemplated by his employment, and which if done or omitted lawfully, would have been done or omitted in his employer's name.

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Haag v. Railroad, 85 Penn. St. 293; *Cauley v. Pittsburg Ry. Co.*, 95 Penn. St. 398; s. c., 40 Am. Rep. 664; *Week's Dam. Absq. Inj.*, 10, 120, 123, 127, 266-7; *Whart. Neg.* 300, 304; *Thomp. Carriers*, 344-5; *Pearce Railroads*, 336; *Spooner v. Brooklyn City R. Co.*, 54 N. Y. 230; s. c., 13 Am. Rep. 570; *Hearn case*, 34 Ann. 160; *Montford case*, 36 Ann. 750; *Gallaher case*, 37 Ann. 288; *Wood case*, 34 Ann. 1086; *McNeil case*, unreported (O. B. 57 fo. 689); also *Duff v. Alleghany Valley R. Co.*, 91 Penn. St. 458; s. c., 36 Am. Rep. 675; *Citizens' R. Co. v. Carey*, 56 Ind. 396.

We have considered the authorities to which plaintiffs' counsel confidently refers.

That of *Wilton*, 107 Mass. 108-110; s. c., 9 Am. Rep. 11, is a ruling in the case of a girl nine years old, riding, without pay, by invitation of a driver, on the platform of a street railroad horse passenger car, who by the sudden start lost her balance, ordering the driver to stop, the car keeping on. She fell, her arm was run over and had to be amputated.

The other case, *Pennsylvania R. Co.*, 31 Penn. St. 372, is that of a lad nine years old sent on an errand by his father, who finding a crossing obstructed by a train of cars, attempted to creep under them, when the train started and injured one of his feet, which it became necessary to amputate.

The facts in the two cases are absolutely dissimilar to those in the present controversy. The principles announced in both are simply, that if a passenger, riding with due care on the platform of a passenger horse car of a street railroad corporation, not as a passenger for hire, but by invitation of the driver and without collusion with him to defraud the corporation, is injured through his negligence in driving the car, the corporation is liable; and that a child of tender years is not to be held to the same rule of care and diligence in avoiding consequences of the negligence or unlawful acts of others, which is required of persons of full age and capacity.

The third case to which plaintiffs refer (24 Smith, 424) is one in which a little girl five years old was allowed to ride on the platform of a street passenger car, and who was hurt in attempting to get off, notwithstanding the driver's remonstrance. *Pittsburg P. Ry. Co. v. Caldwell*, 74 Penn. St. 421.

The court held it was negligence in the driver to allow children so young to ride on the platform, and the company was liable.

Conceding to those authorities all the weight which is claimed

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for them, it is clear that they are inapplicable to the present case, in which the facts proved are quite different, although kindred principles may be involved and receive application.

The ruling invoked in the *Wardle* case, 34 Ann. 204, has no bearing on the issues here presented.

The District judge correctly viewed the facts and the law, and properly relieved the company.

Judgment affirmed with costs.

Judgment affirmed.

CITY OF SHREVEPORT V. RED RIVER AND COAST LINE.

(37 La. Ann. 508.)

Municipal corporation — wharfage.

A street in a city was laid out upon the bank of a navigable river, and paved and maintained at the expense of the city. Vessels were in the habit of landing at the street, and discharging their cargoes thereupon. *Held*, that the city was not entitled to charge as for wharfage facilities. (*See note, p. 508.*)

ACTION for wharfage. The opinion states the case. The plaintiff had judgment below.

E. H. Randolph and *H. L. Edwards*, for appellee.

W. S. Benedict, for appellant.

POCHÉ, J. Plaintiff seeks to recover \$4,409.04 as wharfage dues on several steamboats owned and operated by the defendant company, at the rate of ten cents a ton for each boat landing at the river front of the city, from the 4th of August, 1882, to the 20th of May, 1883.

The grounds of resistance are substantially, that the charge is really a tonnage duty; that no wharfage facilities or conveniences are furnished by plaintiff; and that the amount charged is beyond a reasonable compensation. The defendant appeals from a judgment against it in the sum of \$428.97, and plaintiff prays for an increase of the judgment to the amount sued for.

The contention that the claim involves a tonnage duty, levied in violation of sections 8 and 10 of article 1 of the Constitution of

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the United States, is virtually abandoned on appeal. The whole theory of plaintiff, and the wording of the city ordinance on which the claim is predicated, show conclusively that the demand is based on alleged wharf facilities and conveniences furnished by the city and used by the defendant's boats during the time claimed for.

The right of recovery in such cases depends upon the artificial facilities for landing, for receiving and discharging merchandise, furnished by the plaintiff for the use or advantage of the ships or vessels sought to be made liable for such duties.

A charge for the privilege of entering a port, or of remaining there, would fall within the scope of the constitutional inhibition. But a claim for services rendered in the shape of wharfage facilities is recognized in law and has been enforced by the courts. *First Municipality v. Pease*, 2 Ann. 538; *Ellerman v. McMuins*, 30 Ann. 190; *Mayor and Trustees of St. Martineville v. Steamer Mary Lewis and Owners*, 32 Ann. 1293; *Packet Co. v. Keokuk*, 95 U. S. 88.

The pivotal question in this case involves therefore the existence during the time claimed of wharves or other artificial facilities used by the defendant and provided and maintained at the expense of the corporation of Shreveport.

The undisputed facts in the record are, that the main or principal landing in Shreveport is in front of Commerce street, which borders on and runs along Red river, between Texas and Cotton streets, which run from the river to the interior of the town. Between those streets, for a distance of some 1,200 feet, Commerce street, of the width of 132 feet, is rocked or covered over with cobble-stones; which work is maintained at the expense of the city.

During the highest stage of water in the river, which lasts about forty days in each year, boats may and do land right at Commerce street, on which they discharge their cargoes and from which they receive their return freights.

But during all other portions of the year, all water-crafts land and carry on their traffic on a sand-bar in front of said street, but many feet below its level, under an inclining bank of the river, or on the banks of a stream known as Cross bayou, which empties into the Red several blocks above the foot of Texas street.

The record shows beyond a doubt, and it is conceded by plaintiff as a fact, that during low stages of water the city furnishes no artificial means whatever to facilitate the landings of boats or other

water-crafts, and that all merchandise and other property shipped or received by water are deposited on the ground at the landing; and are kept dry in wet weather by being laid on dunnage, composed of planks and timber furnished by the owners of steamboats themselves.

From that circumstance derives the theory of the judgment appealed from, as it holds the defendant liable only for the landings made by its boats during high water, at Commerce street.

At this point we may dispose of plaintiff's prayer for an amendment of the judgment; it can find no sanction either in law or in the evidence before us. The argument that the defendant is liable for wharfage duties in low water, when avowedly no artificial facilities whatever are furnished by the corporation, because their freights are hauled over Commerce street, because they leave thereon their skids and other material, and because they enjoy at that time as well as in high water the fire and police protection of the city, needs but to be stated to expose its utter weakness and its absolute lack of foundation in law, reason or common sense.

The remaining, and in point of fact the vital, contention in the case hinges therefore upon the question as to whether Commerce street, paved or rocked as we have stated above, and used as a landing in high water by the defendant's and other boats, is a wharf within the accepted sense of the term. It is on that point mainly that the testimony is conflicting. Plaintiff's witnesses all concur in treating it as a wharf, and defendant's witnesses are equally unanimous in denying the proposition. The witnesses on both sides all agree substantially on the facts, but the divergence comes out of their varied definitions of the terms wharf and wharfage facilities. They all agree that Commerce street is one of the principal thoroughfares of the city, bounded on one side by the river and lined on the other by a series of large stores and warehouses; that vehicles of all kinds and descriptions are constantly run over it, and daily bring to and from the stores thereon large quantities of cotton and every kind of goods and merchandise used and traded for in commerce, as well to and from the steamboats as other points in the city, from and to railroad depots, and to and from the country. They all concur, as far as their means of knowledge extend, that the works by means of which the street, at that particular point, is rendered and made fit for constant use and passable at all times, were made by and at the enormous expense of the city; that it is

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maintained at the expense of the corporation, and that one-third of the original cost was charged to and paid by the owners of lots abutting thereon. The only point left open therefore involves the proper meaning of the terms wharf and wharfage facilities.

We adopt the definition suggested by plaintiff's counsel and given by Webster: A wharf is "a perpendicular bank or mound of timber or stone or earth raised on the shore of a harbor, river or canal, etc., or extending some distance into the water for the convenience of lading and unlading ships and other vessels." By Bouvier, a wharf is defined as "a space of ground artificially prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of such vessels." These definitions substantially agree with those given by other authors.

The essential requisite is an artificial construction which facilitates the loading or unloading of vessels or steamboats. Now, what facilities are afforded in this case by the works constructed and maintained at the expense of the city of Shreveport?

Whether they land in low water at the sand-bar, or in high water at Commerce street, the boats are tied to posts provided by their owners, and launch their stages to the river bank, on which their freights are deposited, using dunnage in either case when the condition of the weather or of the soil requires that precaution.

It will not be gainsaid that when he has thus delivered the goods or merchandise intrusted to him for transportation, the common carrier has fully complied with his contract of affreightment, whether the delivery takes place below on the sand-bar or above on Commerce street.

The only difference is felt in the hauling; from Commerce street it is shorter, and in muddy weather it is facilitated by the cobblestone pavement. But as to the common-carrier, the evidence discloses no difference; and we have failed to discover any enhanced facilities afforded to him by the works which plaintiff erroneously holds out as wharf facilities, unless it be in the means of approaching his landing.

We conclude and we therefore hold, that those works contribute to enhance the general commercial facilities of the city of Shreveport; but that they do not materially add "to the convenience of lading and unlading ships and other vessels" at that port.

This record, in our opinion, presents the attempt of a corporation to charge and collect wharfage "for the use of that which is not

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a wharf, but merely the natural and unimproved shore of a navigable river." Such pretensions have always been discountenanced by the courts. *Cannon v. New Orleans*, 20 Wall. 577; *Packet Company v. Keokuk*, 95 U. S. 88.

Hence the city has no power or authority to charge wharfage duties on the grounds set forth in this suit; and the judgment appealed from is therefore erroneous.

Concluding, as we do, that steamboats are not specially benefited by the works erected on Commerce street, and that their owners cannot be charged therefor simply because they are incidentally facilitated in their trade in common with the balance of the commerce at Shreveport, we are not concerned with the question of the character or rate of charges made by the city in the premises.

The judgment rendered in favor of plaintiff is therefore annulled, avoided and reversed; and plaintiff's claim is rejected and her action is dismissed at her costs in both courts.

Rehearing refused.

NOTE BY THE REPORTER.—In *City of Keokuk v. Keokuk Northern Line Packet Co.*, 45 Iowa, 196, the contrary was held as to a non-tidal stream. The court said: "It is very plain that the paved street at which defendant's boats were landed comes within the designation of a wharf, which is constructed of stone and earth or timber, for the convenience of vessels in landing. Where there is a tide, or where it is demanded by the motion of the water upon which the wharf is built, it extends into the bay or stream. Where there is little variation and sufficient depth of the water, and a smooth surface, the wharf is constructed of stone or timber upon the beach, so that the vessel may lie broadside to the shore. As a matter of fact, of which we will take notice, all wharves upon the Mississippi river in this State are constructed in the manner last described. If it be constructed upon, or is an extension of the street into the river, it is none the less a wharf."

TOWNS V. VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

(37 La. Ann. 630.)

Master and servant — negligence — unequal buffers.

It is negligent in a railway company to have cars in a construction train furnished with buffers of unequal heights.*

* To same effect, *Gottlieb v. N. Y., etc., R. Co.*, 29 Hun, 637; *Fry v. Minneapolis, etc., Ry. Co.*, 30 Minn. 231; *King v. Ohio, etc., R. Co.*, 14 Fed. Rep. 277.

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ACTION for negligence causing death. The opinion states the case. The plaintiff had judgment below.

Boatner & Boatner, for appellees.

A. B. Pittman, and *Ludeling & Stillman*, for appellant.

FENNER, J. The present action is brought by a father and mother for damages for an injury to their son, James Towns, inflicted by the cars of the defendant company and resulting in his death.

The facts are substantially as follows:

James Towns was in the employ of the defendant company as brakeman, on a construction train. At a certain point known as Russton station, there were certain idle cars on the track which the conductor had received orders to remove to a side-track in order to make room for an approaching passenger train. At about dark in the evening, the conductor gave orders to the engineer and brakeman to effect the removal. To do this it was necessary to run the train down to the stationary cars in order to couple with and draw them away.

The brakeman, Towns, in the performance of his duty and in obedience to the orders of his superiors, stood by to effect the coupling. He had placed the coupling pin in the hind-most car of the train, and then taking his position by the car which was to be attached, to be ready to make the coupling, gave the signal with his lantern for the engineer to back his train. The engineer obeyed the order. The train approached, and on reaching the car the coupling pin struck the draw-head and broke. The two meeting cars being of unequal height, the buffers or draw-heads did not meet, but one being elevated above the other, they passed each other, and the cars themselves came into collision, mashing the body of the unfortunate brakeman and inflicting upon him fatal injury.

The plaintiffs charge that the defendant is responsible on the grounds that the injury was attributable to the combined causes of, first, the reckless carelessness of the engineer in throwing back his engine with heavily loaded cars attached, against the stationary car with unusual and excessive speed; and second, the insufficient and unsafe appliances which were provided for the coupling of the cars.

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The company defends on the following grounds:

1. Contributory negligence of Towns.

2. That the company is not responsible for the negligence and carelessness of the engineer, who was the fellow-servant of Towns in a common employment.

3. That the inequality in the height of the cars and the consequent inefficiency of the buffers is not such a defect in the appliances and apparatus furnished by the company as constitutes legal negligence.

So far as the charge of contributory negligence is concerned, it has not the slightest foundation. The brakeman was where he was in the performance of his duty and in obedience to orders. There was no call for him to jump out of the way, because his duty required him ordinarily to remain; and the evidence is that his position did not enable him to judge of the speed at which the train was thrown back or to anticipate that he would not, in any event, be protected by the buffers.

If the accident had been occasioned exclusively by the negligence and carelessness of the engineer, perhaps the defense of common employment might prevail. That doctrine has not had extensive application in this State, but it has nevertheless been recognized. *Hough v. Railroad*, 100 U. S. 218.

There is a tendency in modern jurisprudence and legislation to limit the extreme operation which has been given to it by the courts of this country and of England. In the latter country the Parliament has intervened by the legislation known as the "Employers' Liability Act."

And here the Supreme Court of the United States has, in a very recent decision, placed a very important limitation upon it, by holding that the conductor of a train, who has the right to command and control the train and the employees, does not bear the relation of fellow-servant to the latter, and that the company is responsible to them for injuries resulting from his neglect of duty. *Railroad Co. v. Ross*, 112 U. S. 377.

No doubt this principle might receive extension to other relations between officers having the right to command and subordinates subject to such command.

However, in the particular operation of coupling trains, doubtless the relations between engineer and brakeman have all the features of fellow-service; and as already intimated, if the engineer's

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negligence were the sole cause of the injury, the overwhelming weight of authority would exempt the company from liability.

But it is now settled upon the very highest authority that where the injury is caused partly by the negligence of a fellow-servant and partly by the failure of the company to provide proper and suitable apparatus, the negligence of the co-servant will not exonerate the company from the consequences of its own default. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700; *Ellis v. R. Co.*, 95 N. Y. 546.

In this case the evidence is conflicting as to whether the engineer was in fact guilty of any negligence or of backing with undue speed, and we might say that the evidence against it preponderates. It is at all events sufficiently established that the speed was not such as to have inflicted any injury upon the brakeman, had the buffers of the cars been in such position as to operate.

The question then remains whether the use of cars of such unequal height as to render their buffers useless, and the ordering of the coupling of such cars at night and without any particular warning was, under the circumstances of this case, a violation of the company's duty to furnish means and appliance reasonably suitable and safe for the servant's use in the performance of his duty.

It will not be disputed that a principal, if not the main object of buffers is to prevent the collision of cars in coupling, and thereby to protect the brakemen whose duty requires them to stand between the cars in performing that operation.

The provision of such buffers is so ordinary and essential as to make their omission inexcusable.

Now the use in the same train of cars of such unequal height that the buffers pass by instead of meeting each other, is the entire equivalent of omitting them altogether; or rather, is a much more aggravated fault, because their total absence would be a noticeable warning of the consequent danger, while their presence in a condition of complete inefficiency is equally dangerous and less observable.

There are, doubtless, cases in which railroad companies may use cars of such unequal height, and subject their brakemen to the peril of coupling them without being guilty of negligence. Thus, there is no mode of compelling all companies to use cars of like height and construction, and in point of fact, they do not do so.

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Yet the necessities of commerce, and in some cases, the law of certain States, require companies to interchange and transport the cars of each other in carrying out contracts for through freight. Such interchange is essential to the cheap, speedy and convenient transportation of goods, and nearly every ordinary freight train is made up of cars belonging to a number of different companies.

If such cars are found of unequal height and with buffers not co-operative in coupling, the company using them may well repudiate all blame or fault for resulting injuries to its employees, as to whom its duty only requires proper and practicable care in furnishing safe and suitable apparatus.

We have no doubt that the foregoing considerations had their weight in those decisions which are quoted, holding that the use of such cars is not negligence *per se* on the part of a company. Indeed, in some of the cases, those considerations are specially referred to.

But they are entirely inapplicable to the case in hand. The train on which this accident occurred was not a general freight train.

It was a construction train, and there is no showing or pretense that the cars therein or the cars to be coupled thereto, did not all belong to the company itself.

The question therefore is: Whether it is negligence for a company to construct and use its own cars of such unequal height as to render their buffers useless, and thus to imperil the lives of their brakemen.

In matters of this kind, when one enters upon the study of the infinite number of adjudications which have been rendered by a multitude of courts, he encounters a maze of contradictory decisions and an infinite variety of qualifications of even generally accepted principles, which stupefy the mind and render it impossible to reach a conclusion consistent with them all.

But we think we may safely say that this principle is consecrated by a controlling weight of authority, viz.: that while the railroad company is not the insurer of its employees, and is not necessarily bound to employ the best possible means and appliances, it is bound to exercise reasonable and ordinary care to provide such suitable and safe apparatus as common experience shows to be proper in order to avoid exposing the lives of their employees to unnecessary danger in the discharge of their hazardous duties.

Certainly, the provisions of cars with buffers is a precaution of

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such accepted necessity and universal use as to place it within the requirements of the most ordinary reasonable care. If such care requires such provisions, it equally requires that they should be provided in such manner as to effect the purposes for which they are designed; and a neglect to make such provision is unquestionably a fault rendering it responsible for resulting injuries, unless at least it were clearly shown that the employee, fully cognizant of the defect, had voluntarily and intelligently accepted the hazard.

There is no sufficient evidence that such was the case here. The coupling took place at night. It was in a train of cars belonging to the company, and as to which there was no reason to suspect such a defect. There was no time or opportunity to measure the height of the cars to be connected, and even though the use of the "goose-neck" link might have suggested some difference, it did not at all follow that the difference was such as would permit the buffers to pass each other without sufficient contact to prevent collision.

We find it impossible to say that the brakeman knew or accepted the risk of so great a defect.

We find this case to be completely covered by a recent decision of the Court of Appeals of New York analogous to this in every essential respect. The party injured was a brakeman; the injury resulted from a like defect in the cars; the defense was the same as in this case. The court said: "It is no doubt settled in this State that an employee of a railroad company takes the natural risks of his employment and among others the risk of injury resulting from the negligence of his fellow-servants.

"This rule however has no application, if the company has at the same time disregarded its obligation to provide suitable cars or other necessary apparatus, so that the injury is not entirely caused by the negligence of the fellow-servant, but in part at least is the result of that omission of duty. In such a case the negligence of the co-servant will not exonerate the company from the consequences of its own default. Here it was the duty of defendant to provide a car properly fitted, not only with the running apparatus, as wheels, stopping apparatus, as a brake, but with buffers of some kind to protect the car and its servants necessarily or lawfully thereon from the effect of a collision. Ordinary and usual care in the equipment and running of a road requires this last appliance or some equivalent contrivance as much as it does either of the others.

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There was, in effect, no buffer or any thing to take its place on the cars upon which the intestate was employed. * * * The death of the decedent was therefore caused by the omission of the defendant to place buffers where they belonged. For any useful or usual purpose, the ones in question might as well have been placed on the top or at the side of the car, as where they were." The statement of facts shows that the cars were provided with buffing apparatus, "but at such different elevations that instead of meeting to receive the concussion, they were ineffectual for any useful or designed purpose." The court held the company liable. *Ellis v. Railway Co.*, 95 N. Y. 546.

It is not to be denied that the learned counsel for defendant has referred to decisions opposed to the above; but the latter commends itself equally to our reason and sense of humanity.

The vast development of railroads, the immense army of servants whom they employ and who adopt such service as their exclusive vocation, with many other considerations, emphasize the duty of the companies to provide all reasonable safeguards for their protection in their hazardous employment, and not to oppress them with the hard option of either exposing their lives to risk or of abandoning their means of livelihood.

[Omitting a minor question.]

It is therefore ordered that the verdict and judgment appealed from be amended by reducing the same to \$1,000, and that as thus amended, the same be affirmed, appellees to pay costs of the appeal.

Judgment affirmed.

TURNER V. VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

(37 La. Ann. 648.)

Carrier — railroad — negligence — platform higher than cars.

It is negligent in a railroad company to have a station platform higher than the car steps, and to require passengers to board the trains from a baggage car.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

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Boatner & Boatner, for appellee.

A. B. Pittman and Ludeling & Stillman, for appellant.

POOHE, J. Plaintiff claims damages in the sum of \$7,500, for injuries received by her through the alleged carelessness and negligence of the defendant company and of its employees, when she was boarding one of its passenger trains at one of its stations.

The defense is a general denial, coupled with the special averment that as the wife of one of the company's employees, travelling free of charge, plaintiff cannot recover damages for injuries received under such circumstances.

The defendant appeals from a verdict and judgment against it in the sum of \$1,000, and plaintiff prays for an increase of the allowance.

The record shows that plaintiff was not a free passenger, and that she had paid her fare; hence that element of the defense is virtually abandoned on appeal.

Concerning the manner in which the accident occurred, the testimony is considerably conflicting, but the preponderance of the evidence establishes to our entire satisfaction the following state of facts:

When the train, which was a mixed one, freight and passenger, was stopped at the platform of the station, the passenger coaches did not reach the platform, which in height was nearly even with the floor of the ordinary railroad coaches; whereupon the conductor requested plaintiff to enter in the baggage car, which stood against the platform, and from there to walk to the rear end of the train to the ladies' car, which was the second from the baggage coach.

After assisting her from the platform, and she had begun to walk to the rear, the conductor gave the usual signal to start the train. At the moment that she was stepping from that car to the next, unassisted by any one, the train moved with a jerk, causing her a misstep, in consequence of which she lost her balance and fell to the ground between the platforms of the adjoining cars, and received serious injuries, breaking two ribs of her body, from which injuries she was confined to a bed of suffering for a considerable length of time, and from the effects of which she had not yet recovered when the case was tried below.

From that statement we conceive that it would be difficult to

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present a case of greater negligence and of more wanton indifference to the safety of its passengers on the part of any common carrier.

No principle finds more solemn sanction in jurisprudence and even in the sense of humanity than that which imposes on railway companies "the legal obligation to furnish safe and proper means of ingress and egress to and from trains, platforms, station approaches, etc." Courts have imposed that obligation on railroad companies for the protection even of persons who go to the depots and stations only on business.

But it is easy to conceive that the duty is still more imperative and sacred in the case of passengers who desire to enter on or leave a train after paying therefor, and thus entering into a contract which makes the obligation to provide for their safety absolutely binding and perfect.

Hence we have no hesitation in holding that a railroad company which affords no greater facilities to passengers in boarding their trains than the alternative to step down to the ground from a platform, and thence to climb up the car steps into the proper passenger coach, or to step into a baggage car and thence to walk to the rear, crossing over car platforms while the train is in motion, is guilty of gross negligence, and is responsible in damages for injuries received by its passengers in their attempt to perform this unjustly imposed feat.

In the case of *Peniston v. Railroad Co.*, 34 Ann. 778, we had occasion to make an extended review of jurisprudence in its exposition of the principle which underlies the present case, and we need not repeat here the satisfactory result of our researches. Suffice it to say that the degree of negligence which we have to deprecate in the case at bar is much greater than that involved in the case referred to.

We note the forcible argument made by plaintiff's counsel for an increase of the damages allowed her by the lower court. The increase asked is predicated on prospective damages growing out of the helpless condition of their client, who is now a widow, unable to labor for her livelihood; but the record shows that her husband, who was fully able to support her, has died since the occurrence, and hence her helpless condition is due to the loss of her husband, and not to the fault of the defendant.

Courts must be very cautious in dealing with elements of pros-

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pective damages, which should never be allowed but in clear cases, supported by tangible proof, and in a measure independent of expert testimony.

We think that the verdict of the jury has done full justice in the premises, and we do not feel warranted to disturb it.

Judgment affirmed.

VAN AMBURG V. VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY.

(87 La. Ann. 680.)

Master and servant — negligence — unsafe railroad bridge.

A railway company is liable for a personal injury to a locomotive engineer caused by an unsafe bridge, while the road was in course of construction and not open for trade or travel.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

Boatner & Boatner, for appellee.

A. B. Pittman, and *Ludeling & Stillman*, for appellant.

MANNING, J. The plaintiff sues for the recovery of damages sustained by the death of her son caused by the breaking of a bridge on the defendant railway at Alligator bayou in Bossier parish. The damages are laid at \$5,000 for agony and suffering bodily and mental endured by the victim of the disaster, and a like sum for the loss of his support and the deprivation of his society, care and affection.

The defense is a general denial and a plea of contributory negligence. The verdict was for one-half the sum claimed, viz., \$5,000.

The second item of damage cannot be considered. Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man cannot be made the subject of valuation, and under the domination of that dogmatic utterance, made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the singular spectacle has been witnessed of courts sanctioning damages for short-lived pains, and refusing them for a life-long sorrow and the

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pecuniary losses consequent upon the death of one from whom was derived support, comfort and even the necessary stays of life. Legislation has at last come to the relief of future sufferers. The act of 1884 applies the remedy that the public conscience has long demanded, but it has missed application to this case only by a few days. That act was approved July 10th and took effect in Bossier on the 30th. The accident and death occurred on the 25th of that month.

It was ingeniously argued to us that this statute merely provided a remedy for a previously-existing obligation — that in morals and conscience he who caused the death of another should make reparation to the survivors as in law he who caused damage by a fault was legally obliged to repair it — and therefore that the remedy provided by the statute could be and ought to be applied to injuries inflicted before its passage. This would open the door to a multitude of suitors and therefore courts would be cautious in making such interpretation, but in truth the argument is not sound, for it is based on the assumption that this is a remedial statute and on the principle that such statutes are construed liberally, but our late statute is not remedial in the sense of supplying a remedy. It creates an obligation by expressly declaring the existence of a liability where there was none before and opens the way to a recovery for its violation.

The son who was killed, James Van Amburg, was a locomotive-engineer on the defendant railway and was running a construction train over the bridge across Alligator bayou when the bridge broke, the engine was hurled a depth of ninety feet into the bayou, and the engineer was killed. The road was not open for traffic or travel. The train was composed of two flat-cars in front of the engine and one box-car in the rear. The conductor and some of the laborers were in the front car. The bridge was not in the condition that was intended to be permanent, that is, it was not finished in the manner it was intended to be for permanent use, but it was completed so far as it was intended to be for construction purposes. The foundation and skeleton of the bridge was complete. One cap was on each of the piles and the stringers were laid on those caps. When construction was completed another cap would have been placed on and thicker stringers and these would bring the bridge to a level with the road-bed. The stringers were made of round logs hewed to a flat surface, were of gum, ash, pine and some oak and cypress, were twelve inches thick and fifteen feet long, and

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had been cut from the forest about six months before the accident. They were green when laid down.

In its then condition the bridge was lower than the road-bed. There was consequently an incline at each end, the road-bed sloping down to the bridge, which therefore formed a sort of concavity.

The party was late getting out to work on that day and the train was moving fast, too fast, say the conductor and another, for safety. Van Amburg was prone to run fast. That was characteristic of him. He was singularly exemplary in his habits—did not drink spirituous liquors, was active, intelligent, knew his business well and attended to it punctually and methodically.

This driving the engine is the contributory negligence pleaded. The conductor testifies that six miles an hour was fast enough to run over this bridge—ten miles the maximum of speed, and the chief engineer of the company says “the condition prevailing there at that time could not have permitted a higher rate of speed than eight miles an hour.” The concurrent testimony is that the train was running at not less than fifteen miles an hour.

The bridge is thus shown to have been unsafe, and its unsafety was known to the chief engineer, who had authority to have it made safe, and to the conductor who had control of that train, and could have made the locomotive-engineer slack to a snail's pace if he had been then as alive to the danger as he was on the trial. His neglect to peremptorily order the crossing this bridge at this time and at all times at not greater speed than ten miles, which he says was the maximum permissible, is little short of criminal. On this particular occasion it was more than ever his duty to do it. He knew Van Amburg was prone to drive fast, and that he was energetically devoted to the interests of his employers. On that day the gang of laborers was late, and though it was no fault of Van Amburg, his concern for the work would inevitably induce him to make up for lost time and not time he had lost himself. The conductor only a few minutes before had flagged him down, according to his expression, and he had crossed Red Chute bridge safely. He might have saved the engineer's life if he had appreciated the situation as vividly as he did while on the witness-stand.

The insecurity of the bridge and the failure of the conductor to command and compel the engineer to always cross it at a safe speed were the combined causes of the accident. The company is responsible for both—for the imperfect bridge, for although a bridge for

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construction purposes is not required to be as solid and complete as for traffic when heavy trains must pass over it, it is necessary that it should be solid and complete enough to make it safe. No company has any right to trifle with the lives of its employees, nor to put them in greater peril than is incident to the nature of their employment. It cannot for the sake of economy or other cause fail to make even its temporary structures sufficiently safe for the contingencies of its special work. No inflexible rule can be laid down on such matters. A scaffolding around a building two stories high upon which one workman is to stand need not be as solid and compactly put together as one around a tower of several hundred feet in height upon which a half-dozen workmen must stand. Each guild or branch of industry knows its own special needs. A railroad company knows, or it is its duty to know at its peril, what is a safe bridge, and there is no sort of doubt they did know this bridge was not safe.

The company is responsible for the other cause, for the conductor was the company on that day and for that occasion. He had exclusive command of that train—was to the engineer his master for the time and did not so much represent the company as personate it. He was the company in bodily form with authority to command and power to enforce. The pretension that no responsibility can attach to the company except when it is present through its chief officers would practically relieve it from all responsibility. With its president in New York and its directors equally remote no possibility of fastening upon it any liability whatever would exist. No other doctrine than that it is present in the person of those of its employees who for the time operate it would give the smallest modicum of protection to the public.

The defense that no recovery can be had, because even admitting that the fault lies with the conductor, his act was that of a fellow-servant, is no longer tenable to the extent formerly admitted. The case of *Chicago, Milwaukee and St. Paul R. Co. v. Ross*, 112 U. S. 377, has made an inroad on jurisprudence in the right direction, and we have applied the new principle there established at the present term. The reasons therefor have been or will be elaborated in our opinion in *Towne v. the same defendant*,* and it would be superfluous to repeat them.

[Omitting a question of damages.]

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It is therefore ordered and decreed that the judgment of the lower court is amended by reducing the sum therein mentioned to \$1,000, and as thus amended it is affirmed, the plaintiff and appellee paying costs of appeal.

CONNER V. ROBERTSON.

(37 La. Ann. 814.)

Sales — illegal — of property to be delivered in future.

A contract for the sale of property which the vendor does not possess, to be delivered in future, is not illegal unless both parties understood it to be a mere speculation in the future price, with no intention of delivering or accepting,* and the burden of proof is on the party alleging the illegality.

ACTION for commissions. The opinion states the case. The defendant had judgment below.

R. S. Perry, for appellants.

Breaux & Renoudet, for appellee.

FENNER, J. This case involves the legality of transactions in the purchase and sale of cotton for future delivery, conducted under the rules of the Cotton Exchange of New Orleans, and the right of brokers, who act as agents in effecting such transactions, to recover from their principals commissions for their services and losses paid by them in the execution of their mandate for account of said principals.

The New Orleans Cotton Exchange is a corporation chartered in accordance with the laws of the State. Its membership comprises the leading merchants engaged in all the ramifications of the vast cotton trade of the city. It conducts its business in the most splendid building of the metropolis, situated upon one of its important public thoroughfares. Amongst its purposes, as declared in its charter, are the following: "To establish just and equitable principles, uniform usages, rules and regulations, and standards for classification, which shall govern all transactions connected with the cotton trade; to acquire, preserve, and disseminate information connected therewith; to decrease the risk incident thereto, and

*To same effect, *Whitenides v. Hunt* (97 Ind. 191), 49 Am. Rep. 441.

generally to promote the interests of the trade, and to increase the facilities and the amount of the cotton business in the city of New Orleans."

In execution of these purposes, the Exchange has adopted an elaborate system of "rules governing contracts for the future delivery of cotton."

These rules recognize no contracts except for the sale and purchase of cotton to be actually delivered and received at the future period stipulated. They impose upon the seller the absolute obligation to deliver, and on the buyer the absolute obligation to receive the cotton with the single self-evident and superfluous qualification, "that any party holding a contract against another, corresponding in all respects, except as to price, with one held by the other against him, may close or cancel both by giving notice in writing to the opposite party at any time before notice of delivery," which is an obvious application of the principles of set-off or compensation.

The rules explicitly discountenance and forbid any contracts dispensing with the obligation of actual delivery, and providing for a mere settlement of differences in price, declaring: "All contracts for the future delivery of cotton shall be binding upon members, and of future force and effect until the quantity and qualities of cotton specified in such contracts shall have been delivered, and the price specified in said contract shall have been paid. Nor shall any contract be entered into with any stipulation or understanding between parties at the time of making such contract, that the terms of said contract, as specified in Rule 1, are not to be fulfilled, and the cotton received and delivered in accordance with said rule."

These rules are, by their own terms and by the terms of the contracts entered into under them, written into the contracts and form as much part of the agreement of the parties as the stipulated price or quantity of the cotton.

They are published for the information not only of members but of outsiders dealing through them, are accessible to all, are referred to in the contracts, and no person dealing thereunder can be allowed to plead ignorance of them.

The facts exhibited in this particular case are the following:

Plaintiffs are members of the Cotton Exchange doing business as brokers in contracts for future delivery of cotton. They received an order from defendant's brother to sell, for defendant's account,

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1,000 bales of cotton for delivery in September, 1882. They executed the order by entering into a contract conforming in all respects to the rules of the Exchange, for the sale of 1,000 bales deliverable in September, in accordance with said rules, at the price of 11 78-100 cents per pound. Defendant was duly notified of the sale and fully ratified it.

Under the rules, plaintiffs were the guarantors of the contract made for defendant, and were bound to execute it, whether he provided them with the cotton or not.

The price of cotton rose and defendant was called upon to face a loss. He did not comply with the contract made in his behalf nor take any steps to do so. The 23d day of September arrived and his agents were confronted with the necessity of providing for the execution of their obligations under the contract on the following day. They therefore purchased from a member of the Exchange transferable orders or contracts for the delivery of 1,000 bales of cotton due on the following day. They paid for these the market price of the day. They then called upon the holders of the original contract which they had made in behalf of defendant, and effected a settlement with them by which the latter accepted the transferable orders just purchased, and surrendered the contract made for defendant. The difference between the price at which the sold and the price at which they repurchased was \$5,740.77, which they paid out of their own pockets for account of their principal.

Defendant was immediately furnished with a statement of the transaction showing the amount due by him to plaintiffs on account of his loss and commissions.

He made no objections to the account or to the contract of his agents. His commission merchants in the city made sundry partial payments with his full approval. He sought the assistance of his father to enable him to settle the account which was denied. He finally said that he was broke and could not pay, and then this suit was brought. He now sets up a two-fold defense, viz.: First, that plaintiffs were not authorized to make the transaction for him. Second, that the transaction itself was a wagering contract, a mere gambling transaction, affording no basis for a judicial action.

Defendant's own testimony is sufficient to show that he should have spared his conscience the strain of making the first defense, and it needs no further notice.

The questions arising under the second branch of the defense

are in great measure new to this court, but they have been often considered and determined by the courts of England and of the United States. We think there is no substantial difference, at least affecting this case, between the law of Louisiana and the existing law of England and of the other States of the Union on the subject of aleatory or wagering contracts.

We have no concern with the general definitions and provisions of our Code on the subject of aleatory contracts. The only question here is whether this is a non-actionable aleatory contract, and the only provision of our law affecting this question is article 2983 of the Civil Code, which provides: "The law grants no action for what has been won at gaming or by a bet, except for games to promote skill in the use of arms, such as the exercise of the gun, and foot, horse and chariot racing."

It follows that the only question affecting plaintiff's right of action is whether the cause on which it rests was, in form or substance, "gaming" or a "bet."

This is the precise question which arises under the English statute (8 and 9 Vict., ch. 109, § 18), which in effect declares all contracts by way of gaming and wagering null and void, and renders actions for the recovery of money won on any wager unsustainable. A like rule doubtless prevails generally among the States of this Union.

This is sufficient to show that the decisions of the English and other American courts as to what constitutes "gaming," or "a bet," or a "wagering contract," are entitled to full consideration as pertinent authorities.

These decisions are numerous and they exhibit quite a *consensus* of opinion on the following governing principles, which we accept and announce with our own full approval.

1. It makes no difference that a bet or a wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade. and if, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is non-actionable. *Irwin v. Willar*, 110 U. S. 499; *Benjamin Sales* (Bennett's 3d Am. ed.), § 542, and numerous authorities there cited.

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2. In order to affect the contract, the alleged illegal intent must have been mutual, and the intent of one party, not communicated to or concurred in by the other, will not avail. *Grizewood v. Blanco*, 11 C. B. 536; *Ashton v. Dakin*, 4 Hurl. & Norm. 867; *Knight v. Cambers*, 15 C. B. 562; *Cassard v. Hinman*, 1 Bos. 207; 6 Bos. 8; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Smith v. Bouvier*, 70 Penn. St. 325; *Rumsey v. Berry*, 65 Me. 570; *Pizley v. Boynton*, 79 Ill. 351; *Clark v. Foss*, 7 Biss. 540; *Williams v. Tiedeman*, 6 Mo. App. 269; *Sawyer v. Taggart*, 14 Bush, 729.

3. The law presumes that the true intention of parties is that which is expressed upon the face of their contracts, and also that men, in their business transactions, do not intend to violate the law or to make contracts for the enforcement of which the law refuses a remedy. Hence, when one party charges that the contract is infected with an illegal intent, the burden of proof is imposed upon him to establish this allegation. *Irwin v. Williar*, 110 U. S. 499; *Frost v. Clarkson*, 7 Cowen, 24; *Dykers v. Townsend*, 24 N. Y. 57; *Pizley v. Boynton*, 79 Ill. 351; *Williams v. Tiedeman*, 6 Mo. App. 269; *Rumsey v. Berry*, 65 Me. 570.

4. The validity of the contract depends upon the state of things existing at its date, and is not affected by subsequent agreements under which the parties voluntarily assent to a settlement on the basis of differences in price. Parties to such contracts have the same liberty to settle their transactions by common consent according to their own discretion, which is accorded to parties to other contracts. *Clark v. Foss*, 7 Biss. 540; *Williams v. Tiedeman*, 6 Mo. App. 269; *Sawyer v. Taggart*, 14 Bush, 729; *Fareira v. Gabell*, 89 Penn. St. 89.

5. The law is now perfectly settled that an executory contract for the sale of goods for future delivery is not infected with the quality of a wager by reason of the fact, that at its date the vendor had not the goods, and had not entered into any arrangement to provide them, and had no expectation of receiving them unless by subsequently going into the market and buying them.

The contrary doctrine announced by Lord TEXTERDEN in *Larymer v. Smith*, 1 B. & C. 1, and *Bryan v. Lewis*, R. & M. 386, has been distinctly and repeatedly overruled and now ranks as an utterly exploded legal heresy. Benj. Sales, §§ 541, 542, 82, 83; *Hibblewhite v. McMorino*, 5 M. & W. 462; *Mortimer v. McCallan*, 6 M. & W. 58; *Irwin v. Williar*, 110 U. S. 499, and nearly every case heretofore cited.

6. It follows necessarily from the foregoing that the failure to identify the particular goods sold does not affect the matter, because from the very nature of the contract, the sale is not of ascertained articles but of articles of a designated kind and quantity to be selected hereafter, and is discharged by the delivery of articles answering to the general description given in the contract. *Sawyer v. Taggart*, 14 Bush. 729.

Applying the foregoing principles to the facts of this case, the defense absolutely fails at every point. The contract assailed imports, upon its face, an absolute obligation on the vendors to deliver, and on the purchasers to receive the cotton sold. All the evidence concurs in establishing that such were the absolute and actual obligations of the contract.

Not a line of evidence, direct or circumstantial, connects either plaintiffs or their vendees with any agreement, understanding or intention, express or implied, annulling or impairing these obligations.

The circumstances relied on by defendant—that he never intended or expected to deliver any cotton; that he had no cotton to deliver, to the knowledge of the plaintiffs, and had no expectation of having any; that no particular bales of cotton were sold, but only so many indefinite bales of a fixed weight and quantity, and others of like character—all prove, under the principles above announced, to be insignificant and of no avail to impair the rights of plaintiffs.

Defendant's objection that plaintiffs did not execute the contract by the actual delivery of cotton, and that he is not bound by the settlement made without his assent, has no force.

Plaintiffs delivered to their vendees what the latter were willing to accept as the equivalent of the cotton, to-wit, transferable orders from responsible parties for the same amount and quality of cotton at the same time. They bought and paid for these orders, and they could not have bought and delivered the actual cotton at a less price or with less loss to the defendant. What ground of complaint has defendant? Plaintiff carried his contract to the very eve of its maturity, and only when it was evident that he had no intention of providing them with the means either to execute or settle it, and that they would be compelled, under their own obligations, to settle it themselves, did they make the settlement complained of. It was a substantial execution of the contract, but had

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it been otherwise, plaintiffs, left to protect themselves by the unwarrantable default of defendant, might have claimed the right to discharge their obligations in the way most convenient to themselves and to hold defendant responsible for the loss incurred, provided, at least, that loss was not increased by the mode of settlement adopted. The case of *Irwin v. Williar*, 110 U. S. 499, needs only to be read in order to show that it contains nothing antagonistic to the foregoing.

The defense in this case is thus fully disposed of.

The course of dealing in futures on the Cotton Exchange, so far as involved here, is not violative of the existing law. On the contrary, the framers of its rules have exhibited the greatest care and skill in conforming them to the law and jurisprudence. If it is attended with evils hostile to the general welfare, remedy must be sought in future legislation. From the publicity and notoriety of the course of these transactions, it must be inferred that the legislative branch of the government has not seen the necessity of interfering with them.

Even had the legality of the contract here been successfully impeached, the defendant would still have had to meet the serious question whether the plaintiffs, as mere brokers or agents of defendant, might not have recovered, under their contract of agency, their commissions and what they had paid for account of defendant, irrespective of the validity of the contract between the buyer and seller. On this point we express no opinion, only referring to the following authorities for information: *Petrie v. Hannay*, 3 Term Rep. 413; *Faikney v. Reynous*, 4 Burr, 2070; *Planters' Bk. v. Union Bk.*, 16 Wall. 500; *Knight v. Cambers*, 15 O. B. 561; 80 E. C. L. ; *Thacker v. Hardy*, 4 Q. B. Div. 685; *Durant v. Barthe*, 98 Mass. 168; *Lehmann v. Strassburger*, 2 Woods, 554.

We desire to acknowledge the assistance afforded us in the examination of these questions, not only by the learned briefs in the case, but by the able *brochure* of Julius Aroni, Esq., of the New Orleans Bar, entitled "Futures."

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that there be judgment in favor of plaintiffs condemning the defendant to pay to them the sum of \$4,253, with legal interest from December 15, 1883, and all costs in both courts.

SCHREIBER V. BOARD OF ASSESSORS.

(37 La. Ann. 908)

Property — shares of stock of cotton exchange.

Stock of the New Orleans Cotton Exchange is taxable as property.*

ACTION to annul tax. The opinion states the case. The plaintiff had judgment below.

Henry C. Miller and Bayne & Denegre, for plaintiff and appellee.

Wynn Rogers, for defendant and appellant.

MANNING, J. The plaintiff seeks by this action to compel the defendant to strike from the rolls for 1882, 1883, and 1884 an assessment of one share of stock of the New Orleans Cotton Exchange made against him as owner of it, on the ground that there is no law providing for the assessment or taxation of such shares.

In 1882 the board of assessors assessed against the Cotton Exchange all the shares of its stock, and we held that this was without warrant of law, because the act of 1880 had in contemplation the assessment and taxation of stock in money-making and dividend-paying corporations alone, and as it appeared that the Cotton Exchange was in neither of these categories, we annulled the assessment. *N. O. Cotton Ex. v. Board of Assessors*, 35 Ann. 1154.

The assessment in that case was made under section 48 of the act of 1880 (Sess. Acts, p. 102), and the plaintiff argues that the assessments in this case, having been made under section 28 of the act of 1882 (Sess. Acts, p. 128) which is identical with the other, the decision then made applies here and a similar decree must be entered. We do not think so.

These two sections of the two acts are identical but there are essential differences in other sections. The act of 1882 is more comprehensive than its predecessor and the assessment now made is based upon other sections than that cited. The first section of the act of 1880 merely directs that taxes shall be levied upon the assessed valuation of all property within the State except such as is expressly

* See *Barclay v. Smith* (107 Ill. 349), 47 Am. Rep. 487.

exempted. The corresponding section of the act of 1882 repeats this language and then proceeds to declare that "the term property as herein used means and includes all movable property, all personal property * * * all shares of stock and all other things whatever possessing any money-value," and near the close of the act there is a supplemental definition of various terms used therein, i. e., "the phrase personal property or movable property shall be held to mean and include all things other than real estate which have any pecuniary value, and the moneys, credits, investment in bonds, stocks, shares in joint-stock companies or otherwise." Section 88.

It is not claimed that the Cotton Exchange is a joint-stock company, nor is it, since in the suit against it we found that "it pays no dividends, lends no money, transacts no business of its own from which pecuniary profits result to itself or to its members," but it is manifest that shares in other companies are equally declared included in the phrases movable or personal property, and even if this were not broad enough, the term property alone is expressly defined as meaning *inter alios* all shares of stock, and whatever possesses a money value.

That the shares of stock of the Cotton Exchange have a money value is apparent from the testimony of its president and secretary. Three or four years ago a share was worth \$4,700. It now ranges from \$1,000 to \$1,400. Banks and other money lending institutions receive the stock of the exchange as collateral for loans and as pledges. It is quoted among other stocks and that too upon the boards of the exchange itself. It is bought and sold as other stocks are and is sometimes bought as an investment. Any one may buy and hold it. No one can be a member of the exchange unless he owns a share, and therefore it has a value outside of and beyond and in addition to its general market value, as its ownership carries with it a personal privilege. But the ownership of a share does not entitle one to membership. There are seventy or eighty shares held by persons who are not members and they acquired them by purchase. The value of shares therefore does not depend solely upon the privilege or hope of being elected a member. They are bought as other stock is, for speculation as well as investment. They have all the indicia of other securities, such as bank-stock, insurance stock, etc. When the owner dies, they go among other assets into his succession. Like other stocks, their value fluctuates

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with the demand for them. If seventy or eighty persons, not now members of the exchange and not holding any stock, should conceive that their business would be greatly promoted by membership or that other advantages would accrue to them thereby, and they should seek to buy shares, the seventy or eighty holders who are not members would find an instant demand for their shares and an appreciation of their market value would follow.

If these shares of stock be not taxable, it would be difficult to find any securities that are. They fall within the definition of property as including all shares of stock and of course within the broader designation of whatever has a money value.

Besides the objections to the assessment of 1884 there is an additional one to those of 1882 and 1883. These shares of stock were not assessed on the rolls for those years but have been placed upon supplemental rolls. This is expressly authorized by the act of 1882 when it empowers the assessors to assess any property that may have been omitted. Sess. Acts, p. 122, § 11.

The lower court relieved the plaintiff from the assessment of his share of stock, which we think is error. Therefore it is ordered and decreed that the judgment of the lower court is reversed, and that the plaintiff's demand be dismissed and the defendant have and recover of him judgment rejecting the same and for costs.

Rehearing denied.

ROCHE, J., dissented.

C A S E S
IN THE
SUPREME COURT
OF
ARKANSAS.

CHAPLINE V. ATKINSON.

(45 Ark. 67.)

Statute of frauds — agreement to accept draft for drawer's debt to another.

An oral agreement to accept a draft for the drawer's debt to a third party is within the statute of frauds whenever the oral promise to pay such would be, but is valid when upon a new consideration between the promisor and creditor.

ACTION on an order or draft. The opinion states the case. The plaintiff had judgment below.

Jno. C. & C. W. England, and Geo. M. Chapline, for appellant.

T. B. Martin, for appellee.

EAKIN, J. This suit was brought by R. G. Atkinson & Co. against Chapline. They say in their complaint, that the firm of Davis, Blythe & Co. were sub-contractors under Chapline in railroad work, and owed plaintiffs a debt of \$1,586.49. In order to pay that they gave plaintiffs an order on Chapline, dated October 5, 1882, directing him to pay over to plaintiffs any sum which might be due them from defendant, for any kind of work done on the railroad, and advising him that plaintiffs would receipt for the

same. On presentation of this order, on the 18th of October, defendant indorsed on it a conditional acceptance, to the effect that after deducting from the estimate of September, what Davis, Blythe & Co. owed him and their laborers, he would pay the balance over to the attorney for plaintiffs. They say that after said deductions there remained a balance on said estimates of \$1,586.49, which defendant became liable to pay.

Another count charges that defendant, to avoid threatened legal proceedings against his sub-contractors, made, in addition to the indorsement, a verbal agreement with plaintiffs, whereby they agreed to abandon legal proceedings and give Davis, Blythe & Co. sixty days' time, and defendant on his part agreed to pay the claim of plaintiffs of \$1,586.49, in two equal installments, at thirty and sixty days, or so much of it as would not be settled out of the September estimates.

A third count sets up the same agreement and consideration on the part of plaintiffs for the verbal promise of defendant, and varies it by making his promise to pay in installments conditional — provided that Davis, Blythe & Co. should execute to him a mortgage of their tools, instruments and property used in working upon their contract. It is alleged that they did execute such a mortgage.

A fourth count sets up a promise made by defendant to Davis, Blythe & Co. to pay their debt to plaintiffs, in consideration of the mortgage as stated above, and that the mortgage was executed.

The defendant in separate paragraphs denied that any thing remained due Davis, Blythe & Co. on the September estimates, after paying himself and the laborers; and also that he had made the verbal agreement as alleged; or that Davis, Blythe & Co. had ever executed to him any mortgage to secure him in paying plaintiffs. He further pleads the statute of frauds.

There was a trial by jury, verdict and judgment for plaintiffs, motion for a new trial, bill of exceptions, and appeal.

There was no proof sufficient to sustain a verdict that the conditions had occurred upon which the draft was accepted, that is to say, that Chapline had any thing left out of the September estimates, after paying himself and the laborers. If the judgment be sustained it must be on the counts setting up the verbal promise of Chapline to pay the debt of Davis, Blythe & Co., by accepting two drafts at thirty and sixty days.

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The evidence tends to show that Davis, Blythe & Co. owed the debt to plaintiffs. That they were sub-contractors, under Chapline, working upon a railroad; that the estimates of their work were furnished each month to Chapline, by the engineer, and were credited by Chapline on their account. That plaintiffs were about to commence proceedings upon their claim against D., B. & Co., by attachment, and went to a lawyer for that purpose. What their grounds of attachment were is not disclosed. It seems to have been taken for granted by the parties that the attachment proceedings would have been begun but for the arrangements then made. Chapline accepted conditionally a draft drawn upon him in favor of plaintiff by D., B. & Co., and agreed by his indorsement of acceptance to pay on the September estimates, after retaining what they owed himself, and a further amount due their laborers. It was afterward developed that nothing was left in his hands to be paid on that draft. He further agreed verbally with plaintiff that if D., B. & Co. would give him a mortgage on their tools and property, employed in their work, to accept for the balance of their claim, not satisfied by the September estimates, two drafts drawn by D., B. & Co. in favor of plaintiffs at thirty and sixty days. There was no express agreement for forbearance on the part of plaintiffs, or for further time to be given D., B. & Co., or that their debt should be considered as discharged, but forbearance resulted; and a jury might be authorized from the circumstances to infer that such an agreement was implied, and that plaintiffs rested upon that promise, and looked to it for satisfaction of their debt.

They, through their agent, at once took active steps to have the conditions fulfilled upon which the promise depended. They called upon D., B. & Co., and induced them to consent to give the mortgage, and advised Chapline of the result. He renewed the promise, and advised them to send out blank drafts for execution when the mortgage should be made. They did so, and Chapline having in the meantime got the mortgage, declined to execute the drafts. He claimed that the object of the mortgage was to secure himself in his own debt, and that D., B. & Co. had refused to give a mortgage to indemnify him against the proposed acceptances. He took possession of all the property included in the mortgage next day, although the debt which it professed to secure was not due, and has held the property ever since.

The debt of plaintiffs was about \$1,575. The mortgage was to secure a debt to Chapline of \$2,000 in round numbers. That is, it is so expressed upon the face. There is no proof of any particular debt owing to Chapline, although it is stated generally that they were in debt to him on the estimates. One of the witnesses for Chapline says that the sum of \$2,000 was fixed because it was the average of their ordinary running account. But it appears also that their estimates for work per month were that much or more.

The evidence as to some of these matters is conflicting, but this seems to be the result of its preponderance. There is much in detail which has but little bearing. It is tolerably plain that D., B. & Co. were not in debt to Chapline at the time of the September estimates; but if any thing, were entitled to credits for August work. There is nothing definite to show any considerable indebtedness subsequently.

Was the promise valid under the statute of frauds?

The agreement to accept stands with regard to the statute on the same footing with an agreement to pay, and must be in writing if a promise to pay should have been. A leading case upon this point is *Carville v. Crane*, 5 Hill, 483, but it has been often recognized as sound doctrine in other cases cited by Mr. Browne in his work on Statute of Frauds, §§ 174 *et seq.* and notes. It applies to all promises whereby the promisor agrees to put himself in such condition that he may himself be compelled to pay the debt of another.

The real question, and the only one presented is this: Did the proof authorize the jury to find a condition of circumstances which would take this promise to accept out of the range of the statute of frauds? There has been some conflict of decision concerning the class of cases, where after the creation of the original debt a third party subsequently agrees to pay the same. The difference in views has been as to what is necessary to take the case out of the statute, and uphold a parol promise.

In *Kentz v. Adams*, 12 Ark. 174, this court distinctly recognizes the doctrine that a promise by a third party to pay the pre-existing debt of another, becomes an original undertaking not within the statute, where there is a new consideration, moving to the promisor from the person to whom the promise is made. This is rested upon English authorities cited in the opinion.

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The doctrine was distinctly recognized and taken as well established in the case of *Hughes v. Lawson*, 31 Ark. 613. The promise therein judgment was held void for want of the new consideration.

In the language of Mr. Justice HARRISON, "there was no evidence of any new consideration moving to, or inducing the defendant to assume the debt as his own, by which the debt of Hudson (the original debtor) would have been discharged. No purpose of his own was shown to be subserved by his promise."

It may be remarked that in order to take a promise out of the statute of frauds, the discharge of the original debtor is a circumstance, almost, if not quite conclusive, and there is no further question as to the promise being original. It is simply novation. But it is not conclusively a collateral contract in the sense of requiring a written memorandum, because the original debtor remains bound also. Browne Stat. of Frauds, § 212 and note 1.

The rule formulated from the authorities by Mr. Roberts (Robts. Frauds, 232), is that the statute of frauds does not attach if the consideration of the promise "spring out of any new transaction, or move to the party promising upon some fresh and substantive ground of a personal concern to himself."

Chief Justice KENT, in *Leonard v. Vredenburg*, 8 Johns. 29; s. c., 5 Am. Dec. 317, adopted the statement of Mr. Roberts, *supra*. He divided the cases of promises to pay the debt of another into three classes: 1. Where the guaranty is collateral to the principal contract, and is made at the same time and becomes the essential ground of the credit given. 2. Where it is subsequent to the original debt, and not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. In this case the consideration of the original contract cannot attach to the subsequent promise, and some further consideration must be shown. To these two classes, he says, the statute applies, but not to the third, when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. In support of this he cites the case of *Williams v. Leper*, 3 Burr. 1886, as one proceeding upon this distinction.

It is to be observed that this court in the case of *Kentz v. Adams*, *supra*, cites this same English case in support of the doctrine, that a new and superadded consideration for the promise, distinct from the original liability, and moving between the party promising and

him to whom the promise is made, is an original and not a collateral undertaking. We are aware that the classification of such contracts, made by Chief Justice KENT, and the distinction between the second and third classes, has been much criticised from the bench of other States and in treatises on the statute, but it seems to us most consonant with reason, and the fair meaning of the statute. However that may be, it has been the doctrine of this court for more than two score years, without question or dissent. It is not *res nova*.

The classification of Chief Justice KENT, and the principles applicable to the classes, were adopted and followed by the Supreme Court of the United States, in the case of *Emerson v. Slater*, 22 How. 28. Mr. Justice CLIFFORD delivering the opinion, said: "Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are in general within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it; on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute."

The distinction between the second and third class of cases is obvious. In the second, the main purpose and object of the promisor is to make himself a guarantor of a subsisting debt, in which case, although some new consideration is required, he is in the contemplation of the statute as one answering for the debt of another. In the third case he is pursuing his own business views and seeking his own benefit, to be promoted by the promise. It becomes then like a promise to do any other act for a personal consideration, and is not within the mischief of the statute, "although," as Mr. Justice CLIFFORD says, "it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. He also cites the cases of *Williams v. Loper* and *Leonard v. Vredenburg*."

The courts of Massachusetts have held the same doctrine, making the distinction to rest upon the main purpose of the promisor, rather than upon the effect of his promise when performed, to discharge, or not to discharge the debt of another. It is clearly and explicitly announced by SHAW, C. J., in the case of *Nelson v. Boynton*, 3 Metc. 396; s. c., 37 Am. Dec. 148. In accord with that is *Alger v. Scoville*, 1 Gray, 391. Numerous other English and American decisions are cited to the same effect by Mr. Parsons in the text and notes of his work on Contracts, vol. III, pp. 24 *et seq.*, 5th edition. All this line of decisions goes back and rests upon the leading case of *William v. Loper*. With this line Arkansas is in accord, and notwithstanding a great weight of respectable authority *contra*, which holds this third class of cases within the statute also, and which considers the distinction of Chief Justice KENT as frittering away all the benefits of the statute, we see no good reason to change position.

By this principle the instructions of the court and the finding of the jury in this case are to be tested.

For plaintiffs the court instructed: 1st. That if they should find that Davis, Blythe & Co. were indebted to plaintiffs, who were proceeding to enforce their claim against them; and that defendant in consideration of a forbearance on their part to sue, promised that he would pay plaintiffs the amount of their claim, in thirty and sixty days, if Davis, Blythe & Co. would execute to them a mortgage on their property, being then used in and about their contract, and said mortgage was so executed, substantially in pursuance of said contract; and they further believe from all the facts proven, that the transaction was one, the main purpose of which was to subserve the business and pecuniary purposes of defendant, then the contract would not be within the statute, nor would it be required to be in writing, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability. To this instruction there was no exception saved.

2d. Against objections the court instructed, that an agreement to forbear suit on a claim of the plaintiffs against Davis, Blythe & Co. is a valid and sufficient consideration in law to sustain a contract. This is literally correct and had some bearing on the issue, in as much as the plaintiffs must of course have shown a valid contract made on sufficient consideration. It does not touch the ques-

tion of whether such a contract would be within the statute of frauds. A contract without good consideration would not be valid, whether oral or written.

3d. Against objections, the court further instructed for plaintiffs: That if they found that Chapline took the mortgage on Davis, Blythe & Co.'s property to secure the debt due plaintiffs, or to indemnify him against loss by virtue of his paying said debt, then he cannot be allowed to contend that there was no valid consideration for a promise by him to pay said debt. This also goes to the validity of the consideration, and is not upon the point of the necessity of writing. It is the law, and could not have misled an intelligent jury. It appeared from the pleadings that the promise was verbal to pay the debt of Davis, Blythe & Co., or at least an amount to be determined by that, and the *onus* was on the plaintiffs to show two things, 1st, a contract valid in itself, and 2d, a contract of such a nature as not to be within the statute of frauds. The three instructions were each pertinent to one or the other of these points.

For the defendant there was an instruction regarding the written acceptance which requires no notice.

The court declined to give an instruction numbered 3 as asked by defendant, to the effect that no promise to pay the debt of another is valid, unless based upon a valid consideration and reduced to writing. Therefore if the jury should find that the defendant promised if plaintiffs would forbear instituting legal proceedings against Davis, Blythe & Co., and that said promise was not in writing, they would find for defendant; unless they further find that by reason of said forbearance the defendant received some benefit or advantage not before enjoyed.

This instruction was given however by striking out the words "not before enjoyed." We do not think that was erroneous, or that the modification was injurious to the defendant in the light of the evidence. The main object and business purpose of a contract or promise may be to continue on a securer footing, benefits previously enjoyed, and that object may form the predominating motive for a personal undertaking. Besides the evidence is indisputable that Chapline did get a benefit and advantage from the promise not theretofore enjoyed. Through it he obtained the mortgage and full possession of property suitable to the conduct of his business. It was an advantage he very much desired, and one important to him in a business view.

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4th. For defendant the court instructed that if the jury found there had been a pre-existing debt from Davis, Blythe & Co. to plaintiff, and that defendant promised to pay it, they should find for him, unless the promise was in writing or based upon a new consideration, inuring to the benefit of defendant; and also,

5th. The mere agreement on the part of plaintiffs to forbear legal proceedings is not a binding * * * on the defendant, and is not a sufficient consideration upon which plaintiffs can base a promise on the part of defendant to pay their debt unless put in writing; and if the jury should find that defendant agreed to pay plaintiffs the amount of their debt against Davis, Blythe & Co., but that said promise was made on the sole consideration of plaintiffs' agreement not to sell, they should find for defendant. This instruction was correct and prudently required to correct any possible misapprehension of the effect of the two instructions for plaintiff regarding the validity of the consideration.

Taking all the instructions together they seem to us remarkably clear, discriminating and well guarded, and to have been given under a very accurate conception, by the honorable Circuit judge, of the principles governing the case.

It is further urged that the verdict cannot be supported by the evidence. It was a question for the jury to determine whether the promise to accept the drafts was prompted mainly by the motive of securing to plaintiff the payment of their debt; or whether it was made to subserve the business interests and pecuniary profits of the defendant. They might properly judge of this from all the circumstances brought to their notice, and from their general experience of human motives. Chapline was himself a contractor, dependent for his payment on the efficient operations of his sub-contractors. He had control of their property used in the prosecution of the work; no security for such debts as he might find it convenient to allow his contractors to make. An attachment of their property would seriously impede his business operations. He adopted the most efficient mode of averting that, by coming in and agreeing with the creditors upon something satisfactory. Through and by means of his promise he enlisted their services in procuring a mortgage, which he probably could not have got by his own persuasions, independently of the pressure which the plaintiff could bring to bear. He at once took possession of the property and has held it since, free from all risks of attach-

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ment, and has secured himself by the mortgage in a sum which from all that appears is sufficient to protect him from loss, even on accepting the drafts.

If the jury concluded that this was altogether a business transaction, prompted by business motives and a calculation of pecuniary benefits to be derived from the arrangement, we cannot say there was no evidence to justify it.

We find no error in overruling the motion for a new trial.

Judgment affirmed.

MADDOX v. NEAL

(45 Ark. 121.)

Schools — for negroes — mandamus.

District school directors are bound to furnish equal school facilities for blacks and whites, and where they have furnished three months' instruction for the whites, but none for the blacks, and show no intention to do so, and but a few days more than three months remain of the school year; and they have the funds to do it, they may be compelled by *mandamus* to do so, and may not proportion the school term according to the respective number of scholars in each class.

APPPLICATION for mandamus. The opinion states the case. The petition was dismissed below.

Clark & Williams, for appellants.

COCKRILL, C. J. The appellants petitioned the Circuit Court for a writ of *mandamus* to compel the directors of a common school district to provide a school for the education of their children. There are nine of the petitioners and they sue on behalf of all others in the district in like situation. They represented to the court that they were negroes, residents of the district and the parents of about forty children of scholastic age; that two school-houses had been provided for the district in accordance with the requirement of the statute, one for the white and one for the black children; that a school had been maintained for the whites during the scholastic year for a term of three months, but none had been provided for the blacks; that there was money in the treasury to the credit of the district subject to use for teachers' wages; that

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the school for the whites had closed for the year and that the directors had neglected and refused to hire a teacher for the blacks. There was, at the time of presenting the petition, a little more than three months of the scholastic year unexpired, and the petitioners prayed that the directors be compelled to employ a teacher to keep the negro school for a term equal to that already maintained for the whites, that is, a term of three months.

In their answer the directors do not undertake to controvert the state of facts made by the petitioners, but allege only that there were at the last enumeration one hundred and five white and forty black children of scholastic age in the district, and that they conceived it to be their duty to apportion the school funds of the district between the two races in proportion to their number by dividing the funds in dollars *per capita* among all the children, and then to hire teachers, for each race, for such time as the money so apportioned would justify; that they had proffered to do this much for the petitioners and were still willing to do it, but that their offer having been declined, and a demand made by the blacks for a term of school equal that provided for the whites, no school had been provided for them. It appears also, that no school had been provided for them the previous year for the same reason.

The case was submitted to the court on the petition, and answer and an affidavit substantiating the facts set forth; the court dismissed the petition at appellants' costs and they prosecuted this appeal.

Education in this State is a matter of governmental concern. The Constitution declares that "the State shall ever maintain a general, suitable and efficient system of free schools, whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction." The duty is imposed upon the general assembly of providing by general laws for the support of this system by means of a State tax upon all taxable property, as well as by a general poll-tax, and a special tax to be levied by the district at their discretion. Art. 14, §§ 1 and 3, Const. 1874.

Under these provisions the legislature has organized a system of common schools, and have adopted such regulations in reference thereto as in their judgment, to use the language of the statute, will be most "expedient for carrying the free-school system into effectual and uniform operation throughout the State, and providing as nearly as possible for the education of every youth." Mans.

Dig., § 6212: In pursuance of this policy the several counties outside of cities and towns are divided into school districts, and the school affairs and educational interests of the districts are confided to boards of directors to be chosen by the qualified electors in their annual school meetings. A wide range of discretion is vested in these boards by the statute in the matter of the government and details of conducting the common schools, but in the nature of things there is a limit to this discretion. Some positive and imperative duties are imposed upon them about which they have no discretion. The first and most important duty of the board is to make provisions for establishing schools. Without schools there could be no school system, and the directors cannot dispense with the system. When the funds are provided and the directors are not otherwise instructed by the school meeting of the district, the duty to provide a school for at least three months is mandatory, and the duty to establish separate schools for the whites and blacks is also incumbent on them. All the provisions of the law in relation to schools, in conformity to the constitutional mandate, are general; and the system, as far as the statute can make it, is uniform. No duty is imposed upon, or discretion given to the directors about schools for one race that is not applicable to the other. It is the clear intention of the Constitution and statutes alike to place the means of education within the reach of every youth. Education at the public expense has thus become a legal right extended by the laws to all the people alike. No discrimination on account of nationality, caste or other distinction has been attempted by the law-making powers. The boards of directors are only the agents, the trustees, appointed to carry out the system provided for. Their powers are no greater than the authority conferred by legislation. They can do nothing they are not expressly authorized to do or which does not grow out of their express powers. In treating of this subject a learned author says: "The general principles of constitutional law undoubtedly govern the directors' actions as they do the actions of higher authorities, and whatever would violate those principles would be an excess of power on their part." Cooley Torts, 289. The opportunity of instruction in the public schools, given by the statute to all the youths of the State, is in obedience, as we have seen, to the special command of the Constitution, and it is obvious that a board of directors can have no discretionary power to single out a part of the children by the arbi-

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trary standard of color, and deprive them of the benefits of the school privilege. To hold otherwise would be to set the discretion of the directors above all law. If they may lawfully say to one race you shall not have the privilege which the other enjoys, they can abridge the privileges of either until the substantive right of one or both is destroyed. The separate education of the two races in accordance with the terms and spirit of the law is no wrong to either. In the absence of express legislation on the subject, the directors might have provided for this under their general powers. *Union County v. Robinson*, 27 Ark. 116; *Hall v. DeCuir*, 95 U. S. 404; *Roberts v. Boston*, 5 Cush. 198; *Ward v. Flood*, 48 Cal. 36; *State v. McCann*, 21 Ohio St. 198.

But it is universally held that this discretion cannot be exercised so as to produce undue inequality in the educational advantages offered. Authorities *sup.*; *U. S. v. Buntin*, 10 Fed. Rep. 730; *Claybrook v. Owensboro*, 16 Fed. Rep. 297.

The appellants do not seek to question this general power. They have not sought to regulate the manner in which the privilege is to be enjoyed. The object of their petition was not to compel a distribution of the school fund upon any given basis between the two races, or to have a disbursement of any particular amount in their favor. These matters are within the control of the directors so long as their discretion is legitimately exercised within the purview of the statute. In this case it was made manifest that all the prerequisites to the performance of a plain legal duty by the directors existed. Their answer admits their ability to employ a qualified teacher. It was shown that they had sufficient means to pay the expenses of the school; that only a few days more than three months in the scholastic were left, and that they had no intention of providing a school for that period. Under these circumstances we have seen there is no discretion in the directors to reduce the school to a less term, and at this time there was no longer room for the exercise of a discretion as to when the term should begin. The directors could not divert the issue from their failure of duty, by suggesting a willingness to distribute the funds evenly among all the children. The necessity to provide for the schools was apparent, and they were as plainly commanded by the statute to provide for the blacks as for the whites. This statutory duty they could not escape, but in the discharge of it they would be left to determine the amount necessary to sustain each. It is not pretended

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that the distribution suggested would maintain a three months' school for the smaller number. An abuse of discretion in discharging this duty would not be corrected by *mandamus*. Nevertheless, officers who are thus backward in the performance of a duty may properly be set in motion by *mandamus*. High Ex. Rem., § 32. The fact that certain incidents and details of the duty to be performed are within the discretion of the officers is no objection to starting the performance of the duty itself. *Hull, Ex parte*, 14 Ark. 368; *McCreary v. Rogers*, 35 Ark. 298; *Trapnell, Ex parte*, 6 Ark. 9; High Ex. Rem., § 413.

The writ will issue whenever the failure or refusal of officers to act in a matter in which it is their duty to do so is plain, may deprive one of a legal right. *McCreary v. Rogers, supra*; *Hays, Ex parte*, 26 Ark. 510.

In *Cory v. Carter*, 48 Ind. 327, it is said if a school trustee fails in his duty to provide educational means, *mandamus* will lie to compel him. A petition for *mandamus* against a like trustee to compel him to establish a school for the blacks was denied in the case of *State v. Gruff*, 85 Ind. 213, but the decision is put expressly upon the ground that the petition did not show that it was practicable to maintain such a school, inasmuch as there was not a sufficient number of black children in the district to constitute a separate school. The case is in point and authority to sustain the petition here. See too *Gilman v. Bassett*, 33 Conn. 298.

The interest of the petitioners and their consequent right to insist upon the performance of the legal duty come from their relationship to the infant children. "The father," says Judge COOLEY for the Supreme Court of Michigan, "is the natural guardian for the child, charged with his nurture and education, and having a personal duty to perform in respect thereto. Although the proceeding is for the benefit of the child, the duty of placing him in school is the parent's, and the father is entitled on his own behalf to appeal to the courts for the removal of any unlawful impediments." *People v. Board of Education*, 18 Mich. 460. Many of the reported cases of this character have proceeded upon the same principle. *Cory v. Carter, supra*; *Bertomean v. Directors*, 3 Wood. 177; *State v. McCann, supra*; *People v. Gaston*, 13 Abb. Pr. (N. S.) 160.

The Circuit Court erred in refusing the relief sought, and the judgment must be reversed.

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The mandate cannot now however serve the purpose desired, that is, compel the employment of a teacher for the scholastic year now about to expire. Courts never award process for a futile purpose. The petitioners are entitled to their costs, however. The judgment will be reversed and the cause remanded, with instructions to dismiss the petition at the costs of the board, with leave however to petitioners to reinstate during the scholastic year, if a similar state of case should be presented, when the court will proceed in accordance with this opinion.

Judgment reversed and cause remanded.

EAKIN, J., dissenting.

PICKETT V. FERGUSON.

(45 Ark. 177.)

Injunction — to restrain suit in another State — jurisdiction — defendant, partner, not served — landlord and tenant — tenant purchasing landlord's title.

A court of equity may enjoin a party in its jurisdiction from prosecuting a suit in another State.*

A decree of a court against three persons composing a partnership, doing business in the State of the former, rendered on personal service on two of the partners in that State, does not bind the third, who resided out of that State, did not appear and was not personally served.†

A tenant may terminate the lease by purchasing his landlord's title at a voluntary or forced sale.‡

BILL to redeem. The opinion states the case.

Metcalf & Walker, for appellant.

A. M. & G. B. Rose, Humes & Poston, E. F. Adams and S. Humes, for appellees.

SMITH, J. In November, 1877, Ferguson and Hampson, merchants and partners, trading at Memphis in Tennessee, accepted from Mrs. Pickett and her husband a lease of the plantation Nodena, lying in Mississippi county, Arkansas, for the term of

* See *Keyser v. Rice* (47 Md. 203), 23 Am. Rep. 448.

† See *Nat. Bk. of St. Johnsbury v. Peabody* (58 Vt. 492), 45 Am. Rep. 632.

‡ To same effect, *Weichselbaum v. Curllett* (20 Kans. 709), 27 Am. Rep. 204.

five years, to begin on the first of January then next ensuing. They stipulated to pay, on the first of December in each year, a certain rent for each acre of tillable land, the area to be determined by an actual survey, and to repair the fences and buildings. They were to enjoy free of rent any land which they should themselves clear and put into cultivation; but Mrs. Pickett was not to be charged with the value of any improvements. According to the survey, made about the same time, the rents reserved amounted to \$3,510 per annum.

At the time this lease was executed, the plantation was incumbered by a deed of trust, the debts secured thereby aggregating about \$20,000, and a decree of foreclosure had been rendered by the Circuit Court of the proper county; but the cause was pending in this court on appeal. Soon afterward a decision was reached, which is reported in 32 Ark. 346, under the style of *Pickett v. Merchants' National Bank*. And pursuant to that decree the clerk and master of this court sold the premises on the 28th of February, 1879, to Louis Hanauer, for the price of \$18,001. The sale was approved and a deed executed to the purchaser.

Mrs. Pickett was, at the date of the lease and of the sale, the owner of the equity of redemption. Her lessees were not parties to the foreclosure suit, but coming in *pendente lite* were chargeable with constructive notice, and had besides actual notice of the pendency and status of the litigation. The rent for which they were liable for the year 1878 remained unpaid. And they had also about the 21st of May, 1878, collected \$536.33 of insurance money belonging to Mrs. Pickett, which they refused to pay over. She accordingly brought her action in the Circuit Court of Shelby county, Tennessee, against them to recover this rent and insurance money. The defendants claimed to recoup the damages they had sustained by their eviction under the foreclosure sale. The jury returned a verdict of \$3,000 for the plaintiff. Mrs. Pickett having moved for a new trial, the court declared the verdict to be too small, and gave the defendants their option, either to consent that the amount of recovery be increased to \$3,850 or to submit to another trial. As they refused to raise the verdict, a new trial was granted. Mrs. Pickett now dismissed her action at law and filed her bill in the Chancery Court of Shelby county against them and Hanauer. In the trial of the action at law, it had been developed that Hanauer's purchase was made at the instance and for the benefit of Ferguson

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& Hampson, and that he had subsequently quit-claimed to them, they remaining all the time in possession. The theory of Mrs. Pickett's bill is therefore, that Ferguson & Hampson were the real purchasers at the foreclosure sale, and that by reason of the relation they sustained to her, their purchase inured to her benefit. She prays to redeem, upon the terms of refunding the purchase money actually advanced by Hanauer, less the amount due her by Ferguson & Hampson for insurance collected by them and not accounted for, and less also the rents of the place that accrued both prior and subsequent to the sale.

Process was duly served upon Hanauer and Hampson, but there was no service upon Ferguson, except constructive service by publication in a newspaper, nor did he appear to the suit. He had, long before the bill was filed, removed his family from Memphis and had taken up his permanent residence on the plantation, and had become a citizen of Arkansas. His connection with the firm of Ferguson & Hampson still continued, and down to the time of filing the bill he was in the habit of visiting Memphis frequently, but thereafter he systematically avoided going into Tennessee, for the avowed purpose of preventing the service of process upon him.

While the cause was still pending in the Chancery Court of Shelby county, Tennessee, Mrs. Pickett filed a substantial copy of her bill in the Circuit Court of Mississippi county in this State. She charges that the original agreement between her and her tenants had been that they should make their rent notes payable to her order, so that she might sell or hypothecate them in the market, and thus raise funds to pay off the decree against Nodena; but that this stipulation was not inserted in the lease, because the acreage was not then certainly known, and the lessees had afterward fraudulently refused to give their notes, with a view to cripple her resources and precipitate a sale, to the end that they might themselves become the purchasers. She avers that she also owned a valuable residence property in Memphis, which one of the beneficiaries in the trust deed had offered to take in satisfaction of his claim, amounting to \$8,508.58; and that if her tenants had not thwarted her purposes, she could have satisfied the other creditors and have averted a sale. The prayer was that the bill might be retained until the final determination of the suit in Tennessee, to the end that if the plaintiff should be successful there, she might, by appropriate supplemental pleadings, enforce her equities thus

ascertained by a decree here operating directly on the title of the lands, and if she should be defeated there, upon any grounds not concluding the merits, as for example, on account of the absence of Ferguson, then she might be permitted to prosecute her bill as an independent suit for redemption; and in the event that she failed to establish her right to redeem, she prayed to recover of Ferguson & Hampson her insurance money and the rents for 1878.

To this bill the three defendants filed a joint answer, which was made a cross-bill. They denied that Ferguson & Hampson were the real purchasers at the foreclosure sale; but admitted that Hanauer had bought at their suggestion, and for their protection against irreparable injury, they having expended several thousand dollars in the year 1878 in repairs, fencing and clearing land, and in preparations for planting during the term of their lease, and being in danger of losing the benefits of these improvements and outlays by the impending sale, which Mrs. Pickett was powerless to prevent, she being, as it was alleged, utterly insolvent. They further admitted that Hanauer, about one year after the sale, had re-sold and conveyed the plantation to his co-defendants for \$22,541, of which sum \$9,000 were paid in cash, and for the remainder notes secured by a mortgage on the place were given, which were still unpaid. They denied that Ferguson & Hampson had ever agreed to make their notes for the rent. They admitted the non-payment of the insurance money and rent for 1878, but justified the detention of those sums to reimburse themselves for the loss of their term by the constructive eviction of themselves and determination of the tenancy by the foreclosure sale. They denied Mrs. Pickett's right to redeem upon any terms, and alleged that since the purchase they had expended \$25,000 in improvements, consisting of a fine steam gin, thoroughly equipped with machinery of the latest pattern, the erection of a barn, two store houses and more than fifty tenant houses, the building of a levee along the Mississippi river three-quarters of a mile long, the clearing and fencing of seven hundred acres of land, etc. And because the Tennessee court was unable to do complete justice in the premises for the want of jurisdiction over the person of Ferguson, and litigation there was likely to result in casting a cloud upon the title, it was prayed that Mrs. Pickett and her solicitors might be enjoined from prosecuting that suit. A temporary injunction was awarded; but it was disregarded, after knowledge that it had issued, and the

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cause in Tennessee was pressed to a decree. Mrs. Pickett was accordingly adjudged to be in contempt. She afterward offered to file a plea to the jurisdiction of the court, alleging her residence in Tennessee and that she had not been served with a subpoena to answer the cross-bill; but the court declined to entertain her plea until she had purged her contempt by procuring the decree in Tennessee to be set aside. She then asked leave successively to file a demurrer and answer to the cross-bill, and a motion for a continuance, and finally to dismiss her bill without prejudice. But the court refused to hear her, or to permit her to take any further steps in the cause until she obeyed the injunction. On the final hearing Mrs. Pickett was not permitted to introduce any evidence; but the opposite side read all of the records, papers and depositions, taken in behalf of both parties, that were used on the trial of the case in the Chancery Court of Shelby county. Mrs. Pickett's bill was dismissed and upon the cross-bill was decreed that the order restraining Mrs. Pickett from prosecuting her suit in Tennessee be perpetuated and that the title of Ferguson to the land in controversy be quieted as against her claims. No decree was made in favor of Hampson or Hanauer on the cross-bill, presumably for the reason that the Tennessee court had retaliated by an order restraining the prosecution of the suit in Arkansas, and they being subject to that jurisdiction, did not desire to fall under the displeasure of the court. From this decree Mrs. Pickett has appealed.

The case involves several questions of practice, which we have found to be more difficult of solution than the merits of the controversy. And first, as to the restraining a party from proceeding in the courts of another State; this is a matter of very great delicacy, almost inevitably leading to distressing conflicts of jurisdiction. For this reason the courts of some States, notably those of New York, have declined to interfere in such cases. But the jurisdiction is established by the clear weight of authority, as well as by the necessity of interposition under special circumstances where the foreign suit appears to be ill calculated to answer the ends of justice. Sto. Eq. Jur., §§ 899-900; 1 High Inj. and cases cited; *Bushley v. Munday*, 5 Madd. Chy. 184; *French v. Hay*, 22 Wall. 250; *Dehon v. Foster*, 4 Allen, 545; *Carron Iron Co. v. McLaren*, 5 H. L. Cas. 416, 438; 2 Lead. Cas. in Eq. (4th Am. ed.) 1396.

The fact that the real estate, which is the subject of controversy,

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was situate in Arkansas, was not an insuperable obstacle in the way of doing complete justice by the Tennessee court. But as a court of equity in such cases acts *in personam*, it must have jurisdiction over the parties in order to administer the cause. Ferguson, an indispensable party to the litigation, was absent. Mrs. Pickett was thus forced to seek the assistance of the courts of this State. The two suits involve precisely the same questions between the same parties. The defendants to the suit last instituted in effect say: "The property is here. The matter in controversy depends on the laws of Arkansas. The parties are all now before the court, which is not the case in the Tennessee suit. We insist that the whole controversy shall be settled here, and Mrs. Pickett be required to stay proceedings in Tennessee, as a vexatious harassment of us for the same cause of action, when it is evident that the result there will not finally conclude the rights of all the parties." Acting upon these suggestions, the Circuit Court construed the filing of the bill to be an election by Mrs. Pickett to transfer the whole litigation to this forum. Such was not in reality her intention, but only to affect any purchaser of the property with notice by a *lis pendens*, and possibly to acquire undoubted jurisdiction over Ferguson. She therefore filed what her counsel styles an auxiliary bill, to hold the property until the determination of the suit in Tennessee, and then to carry the decree into effect if it should be favorable to her. But we are not aware of any precedent for such a bill. Between the courts of the several States there is no connection or dependence so as to render them subservient to each other. It is only such rights as have been ascertained by a concluded litigation that the courts of other States undertake to enforce. The court below properly assumed jurisdiction over the entire controversy. Mrs. Pickett had voluntarily submitted her rights to its determination and had invoked its aid. The very act of filing the bill implied this and could legally mean nothing less.

And there was an equity to restrain the prosecution of the suit in Tennessee, since it appeared that the court there had no jurisdiction over the person of Ferguson and could make no decree which would bind him.

[Minor matter omitted.]

In her answer to the cross-bill, Mrs. Pickett contended and now contends, that the decree pronounced by the Chancery Court of Shelby county, Tennessee, after the filing of the cross-bill, was a

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conclusive adjudication between the parties to this suit, settling their respective rights in the premises, and forever estopping the plaintiffs in the cross-bill to aver or prove any thing to the contrary in any other court where the same matters might be brought into question. Laying out of consideration the fact that this decree was entered up on the motion of her solicitor, in violation of the injunction from the Arkansas court, and looking at it as if no such injunction had issued, the conclusiveness of the decree will depend on the jurisdiction of the court which rendered it. It is not our purpose to inquire what effect the failure to get Ferguson before the court had upon its jurisdiction to proceed to a final determination as to the remaining defendants. No affirmative relief was granted in the present suit to Hampson or to Hanauer, and they have not appealed. Now as Ferguson was neither personally summoned, nor voluntarily appeared in the Tennessee suit, and was not even a citizen of that State, no court sitting there could render any judgment against him which would be recognized elsewhere as of any validity. Such a judgment is treated in other jurisdictions as a mere nullity. Nor does it alter the case that Ferguson was a member of a commercial partnership whose *situs* was in Tennessee. *Iglehart v. Moore*, 16 Ark. 46; *D'Arcy v. Ketchum*, 11 How. 165; *Public Works v. Columbia College*, 17 Wall. 521; *Pennoyer v. Neff*, 95 U. S. 714; *St. Clair v. Cox*, 106 U. S. 350.

This brings us to the merits. And here it must be conceded, we think, that the purchase of Nodena by Hanauer was, in legal effect, a purchase by Ferguson & Hampson. Hanauer, it is true, used his own money in paying for the place. Indeed the evidence shows that it was entirely beyond the power of Ferguson & Hampson to raise so considerable a sum of money within so short a time. They were a young firm in good credit and excellent commercial standing; but their capital was extremely limited. And this was probably the chief reason why the purchase was made in the name of another, and not a desire to conceal their interest in it on account of any supposed incapacity on their part to bid owing to their relations with Mrs. Pickett. Hanauer was a wealthy merchant, closely connected with Hampson by family ties, and with the firm by business ties. He was willing to assist these young men out of the predicament in which they had involved themselves by taking a long lease of a mortgaged plantation, that was now advertised for peremptory sale, and to furnish the money to buy

it. But he must have security. The plantation itself was a sufficient security, and one which it would not embarrass Ferguson & Hampson to give. So he takes the legal title in his own name. Perhaps they might never be in a condition to take the land off his hands. In that event he would simply have made an investment. Thus without any very definite understanding as to the terms upon which Ferguson & Hampson were to have the benefit of his purchase, Hanauer bought Nodena. Perhaps no trust arose to them out of this purchase which a court of equity would enforce. Perhaps a refusal by him to convey would have been a mere violation of a parol agreement. *Perry Trusts*, § 134; *Williard v. Williard*, 56 Penn. St. 119. Still the fact remains that he purchased for them and not for himself. He did not expect to hold the land, but to resell to them. And he did afterward convey to them. True he charged them an advance of some \$4,500. But this was only a bonus for the accommodation, or a compensation for his risk and the use of his money.

We must then look at the case as if Ferguson & Hampson had been the bidders at the judicial sale. Now it is claimed that they, being tenants to Mrs. Pickett, could not bid, and that if the property was stricken off to them, they would be held in equity as trustees, and could only hold the title as security for the reimbursement of the amount expended.

Judge STORY, in discussing the subject of constructive frauds practiced by persons standing to each other in confidential relations, enumerates "the cases which arise from the relation of landlord and tenant, of partner and partner, of principal and surety, and various others where mutual agencies, rights and duties are created between the parties by their own voluntary acts or by operation of law." *Eq. Jur.*, § 323. And in *Perry Trusts*, § 210, it is said: "The relation of landlord and tenant, partner and partner, principal and surety, and tenants in common may create such influences of trust and confidence that courts of equity will construe a trust to arise out of their contracts, or will decree such contracts to be set aside."

But none of the cases cited in support of these sections were cases between landlord and tenant.

In *Scott v. Levy*, 6 Lea, 662, where a sub-lessee purchased the leasehold estate at an execution sale against his lessor, Mr. Justice COOPER, speaking for the court, says: "Besides Moses Levy, at

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the time, by reason of his possession of the leasehold property under his sub-lease, occupied such a fiduciary relation to his lessors that he could not acquire a valid title against them by reason of the purchase of the property under an incumbrance. All he could do would be to hold his lessors liable under the covenant for quiet enjoyment, or warranty of title, for the amount expended in removing the incumbrance." But as it had already been decided that there was no judgment in evidence to support the execution, and, as moreover proof seems to have been offered of a contract between Levy and his lessor, that he should hold his purchase only as security for repayment, we cannot regard this as any thing more than the expression of an opinion, by a very great judge in equity, that a tenant can not buy his landlord's title under execution and hold it for any other purpose except security.

There is however one case, *Lausman v. Drahes*, 10 Neb. 172; s. c., 35 Am. Rep. 468, which goes to the full length contended for by Mrs. Pickett's counsel. That case asserts that if a tenant in possession purchases the leased premises without surrendering his lease, or notifying his landlord, it will be presumed the purchase was made to protect his possession, and the landlord may redeem.

These are all the authorities on this point favorable to Mrs. Pickett, that the industry of her counsel has been able to collect. On the other hand it is settled law in this State that a tenant, who is under no obligation to pay the taxes, may purchase at tax sale the lands of which he is in possession and may set up such title, and the sale, if otherwise valid, extinguishes the landlord's title and cuts off the lease. *Bettison v. Budd*, 17 Ark. 546; s. c., 65 Am. Dec. 442; *Ferguson v. Elter*, 21 Ark. 160; s. c., 76 Am. Dec. 361. See also *Higgins v. Turner*, 61 Mo. 249. And in *Brittin v. Handy*, 20 Ark. 381, it was ruled that unless some fraud can be shown to have been perpetrated, one tenant in common may purchase at forced sale the moiety of his co-tenant, and may retain and assert the title thereby acquired, as fully as if he were a stranger to the defendant in the judgment. The same principle is announced in *Freeman Co-tenancy and Partition*, § 165.

So it is laid down in the text-books, and has been frequently decided that a tenant may purchase the demised premises at an execution or judicial sale against the landlord, and that in any subsequent controversy between the parties relating to the possession,

or the payment of rent, it may be shown that the landlord's title has expired and the estate becomes vested in the tenant. 1 Washb. Real Estate (3d ed.), 361; Taylor Land and Ten., § 705; Wood Land and Tenant, § 236; Bigelow Estoppel (2d ed.), 374; *Nellis v. Lathrop*, 22 Wend. 121; s. c., 34 Am. Dec. 285; *Hetzie v. Barber*, 69 N. Y. 1; *Ryder v. Mansell*, 66 Me. 457; *Elliott v. Smith*, 23 Penn. St. 131; *Wolf v. Johnson*, 30 Miss. 513; *Camley v. Stanfield*, 10 Tex. 546; s. c., 80 Am. Dec. 219.

And in none of these cases is it intimated that while at law the tenant may purchase, yet in equity he cannot hold against the landlord's option to redeem. On the contrary, in *Casey v. Gregory*, 13 B. Monr. 505; s. c., 56 Am. Dec. 581, a chancery case, it is said that the landlord has no more right to redeem in such a case than if the purchase had been by a stranger.

The obligations of a tenant are to pay his rents and to surrender possession at the expiration of his term. He cannot dispute the title under which he entered. He cannot buy in an outstanding title and set it up against his landlord. He cannot use his possession as a basis to acquire title as an actual settler, and thereupon found a claim hostile to his landlord. And any title which he obtains in his own name, by means of his personal residence, he holds for the benefit of his landlord. *Waggener v. McLoughlin*, 33 Ark. 195; *Chavinger v. Reiman*, 3 W. & S. 486. The foundation of the rule is an enjoyment by permission. And as the estoppel begins by permissive possession, it continues only so long as possession is retained by permission. If the tenant is evicted he no longer owes allegiance to one who does not protect him. Consequently if the landlord, by the determination of his title after demise, loses the power to permit possession, the tenant owes him no duties for the future. Bigelow Estoppel, 351.

Now the reasons which prevent a tenant from purchasing and asserting an adversary title have no application when it is the landlord's own title that he buys. In this case he does not deny the landlord's title, but affirms it. There is no doubt he may buy of the landlord at private sale. What considerations then of law or public policy prevent his bidding when his landlord's title is exposed at an involuntary sale? What duty inconsistent with his right to purchase does he owe his landlord? The bidding is open to all the world and the injury to the landlord is no greater than if any other person had bought; if indeed that can be called injury

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which happens by operation of law, and by the act, consent or neglect of the judgment defendant.

A personal judgment will be entered here in favor of Mrs. Pickett against Ferguson & Hampson for \$536.33, with six per cent interest per annum from May 21, 1878, and for the further sum of \$3,510.10, with a like rate of interest from December 1, 1878. Mrs. Pickett will recover her costs in this court.

EAKIN, J., dissenting.

STATE V. FREDERICK.

(45 Ark. 367.)

Sunday — labor on — barber.

The court will take judicial notice that carrying on the business of a barber on Sunday is not necessary. (See note, p. 556.)

INDICTMENT for carrying on the business of a barber on Sunday. The opinion states the case. The defendant had judgment below.

Don W. Jones, attorney-general, for State.

SMITH, J. The indictment was in these words: "The grand jurors of the State of Arkansas, duly impaneled, sworn, and charged to inquire, in and for the county of Nevada, in the State of Arkansas, upon their oaths present that Adam Frederick, late of said county, on the 3d of May, in the year of our Lord one thousand eight hundred and eighty-five, with force and arms, in the county aforesaid, said day being Sunday and the Christian Sabbath, did then and there unlawfully keep open a barber shop, and labor therein by performing the usual services of a barber, of shaving, hair-cutting, hair-dressing and shampooing, contrary to the form of the statute, and against the peace and dignity of the State of Arkansas.

A demurrer was sustained to this indictment, the following grounds being specified:

"1st. Because said indictment is uncertain, multifarious and insufficient; in that in one count thereof two separate and distinct offenses are charged, viz.: (1). Unlawfully keeping open a barber

shop, and (2) unlawfully laboring on the Christian Sabbath, commonly called Sunday.

"2. Because the said indictment, as to the charge of unlawfully laboring on Sunday, is wholly insufficient and uncertain, and does not state facts sufficient to constitute any offense, in that the labor alleged to have been performed by defendant on Sunday is not averred to have been other than customary household duties, or labor of necessity and charity.

"3d. Because the said indictment, as to charge of unlawfully keeping open a barber shop, does not state facts sufficient to describe any offense known to the laws of the State of Arkansas."

The mere keeping open of a barber shop on Sunday, without performing any labor therein, is not a violation of the laws against Sabbath-breaking. Section 1887, Mansfield's Digest, and the amendatory act of March 2, 1885, are confined to the keeping open of stores and dram shops. Therefore the indictment charges but a single offense — laboring on the Sabbath — and the allegation that the defendant kept his shop open is matter of inducement and descriptive of the manner of laboring.

The indictment needed not to allege that it was not a work of necessity or charity. The courts will take judicial notice that the shaving of his customers by a barber is a worldly labor, or work done by him in the course of his ordinary calling, and not within the exceptions of the statute. *Phillips v. Innes*, 4 Cl. & Fin. H. L. 233.

Judgment reversed and cause remanded, with directions to overrule the demurrer and require the defendant to plead.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—In a test case recently tried in Boston, in the Superior Court, the court charged: "The indictment against the defendant charges that on the 6th day of June, that being the Lord's day, between the hour of midnight of the 5th and the hour of midnight of the 6th, the defendant kept open his shop for the purpose of doing business and labor therein, the same business and labor not being a work of necessity or charity. The laws of the Commonwealth in reference to the observance of the Lord's day say that whoever keeps open his shop, warehouse or workshop for the purpose of doing business or who takes part in any game shall be punished so and so. Incidental to this is the provision as to whoever works or does any thing which is not a work of necessity or charity. Now the courts have decided, in a complaint for keeping open a shop on the Lord's day, that it is a necessary averment that the business or labor done in it, and for which it was kept open, was

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not a work of necessity or charity. It has been decided that this is the essential allegation in the complaint, and that it must be proved. The averment is necessary that the work or labor was not a work of necessity. This is something essential for the government to prove, and in deciding whether or not the defendant is guilty of the offense here charged, you are to pass upon two facts. In the first place, did he keep open his shop, which is mentioned here in the indictment, upon the Lord's day, and did he keep it open for the purpose of doing business or some work which was not then and there a work of necessity or charity? There is no contention with respect to his keeping open the shop. Then comes the next question. Is it shown beyond a reasonable doubt that he kept it open for the purpose of doing work which was not then and there a work of necessity or charity? In reference to that, the statement of the barber is, that people went in and out from that shop from that street and from the hotel. It is a part of the hotel called the Tremont House, and has an entrance from the hotel and from the street. It is claimed that a barber-shop is part of the fitting up of a hotel, and that the services of a barber are services which people recognize as part of the business of a hotel. It is said to be necessary to the guests, and the arrangement between the defendant and the hotel here is that it shall be kept open on Sunday or some portion of the day. The claim is made that he shall keep it open for the purpose of attending to the guests of the hotel, and he himself says very frankly that he shaved every person who came to him on that day. It may be that you will find on this evidence that the defendant kept open his shop, not merely to accommodate the guests of the hotel, but also for the purpose of shaving any one who should appear to him. Then comes the question whether this is a work of necessity or charity. The question for you to find is whether the defendant kept open for the common ordinary practice of the barber's trade, and this raises the question of the necessity for shaving, hair cutting and shampooing. There is no evidence here as to whether there was any thing in this shop for sale. And that brings us to the question of law as to the necessity of shaving, and as to whether such works are works of necessity and charity. A man may have done for him what he would do for himself, so far as having his hair cut, washing his head, and such work. It does not seem to me that it could be other than a work of necessity under the ordinary circumstances. That is, if a man is guilty for shaving another on Sunday, the man whom he shaves would be equally guilty. If a man were brought before me charged with shaving himself, I should in ordinary cases order his discharge, because it seems to me that it would be a work of necessity. Whatever a man may properly do for himself he may properly do for some one else. If he wants to be shaved or have his hair washed, then unless the barber knew he wanted it done for an improper purpose and outside of the ordinary reasons which actuate him, it seems to me that the party is utterly justified in any work which is morally fit to be done. If therefore the shaving was done in this case in a perfectly proper manner on this Sunday, I should say that it was a work of necessity and charity. The law recognizes that some things may be done on this day in such a way as to be an infraction of the law. The courts have decided that the mails may be carried on Sundays, but it must be done without any unneces-

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any disturbance. In other words, the people of the Commonwealth desire a quiet Sunday, and any thing which disturbs public tranquillity is unlawful. If a person opens his shop on the Lord's day merely for the sake of doing work for the comfort, cleanliness and convenience of others, like cutting their hair and shampooing, I should say it is a work of necessity and charity, and that the barber is not indictable for doing this in good faith." Verdict, not guilty.

In *Dixon v. State*, 76 Ala. 89, an indictment for keeping store on Sunday, a single sale of liquor being the only act proved against the defendant, it was held error to exclude evidence that he sold the liquor because of sickness in the family of the purchaser.

A contract made on Sunday to secure decent burial for the dead and to procure the presence of parents of the deceased, is a contract for a work of necessity and charity. *Gulf, etc., Ry. Co. v. Levy*, 59 Tex. 542; s. c., 46 Am. Rep. 269.

Visiting an invalid sister on Sunday is a work of necessity and charity. *Oronan v. Boston*, 136 Mass. 884.

Selling cigars on Sunday is not a work of necessity or charity. *Anonymous*, 12 Abb. N. C. 458; *Mueller v. State*, 76 Ind. 310; s. c., 40 Am. Rep. 245.

See 53 Am. Rep. 332; note, 32 Am. Rep. 557.

ST. LOUIS, I. M. & S. RAILWAY V. LEIGH.

(45 Ark. 338.)

Carrier—railroad—not furnishing seats for passengers.

If a railroad passenger rides on a train and refuses to surrender his ticket or pay, for want of a seat, and is ejected, he may not recover for the ejection, but only for breach of contract to furnish a seat.

ACTION for ejection from a railway train. The head-note shows the point. The plaintiff had judgment below.

Dodge & Johnson, for appellant.

C. B. Moore, for appellee.

COCKRILL, C. J. The contract between the passenger and the railway company, upon which a ticket without qualification is issued, is by implication to the effect that the company will perform its whole duty as a carrier. Among these duties is that of furnishing the passenger the usual and reasonable accommodations for his comfort to the destination named in his ticket. This includes not only

St. Louis, I. M. & S. Railway v. Leigh.

sufficient room, but also a seat in the usual mode of conveyance. Hutchinson Car., § 609; Thompson Car. 67; 2 Rorer Railr. 968-9.

The holder of the ticket agrees that he will conform to the reasonable rules and regulations of the company, and among others, that he will surrender his ticket to the company's agent on demand after embarking on his journey under it. The conditions of this contract are not subject to division, so as to apportion the component parts. It is not within the power of either party to sever the terms of the contract, and demand a performance of the whole, while he himself complies with a part only. The carrier cannot claim a surrender of the ticket upon a proffer by it of transportation alone, because the contract calls for transportation in a seat. The passenger cannot avail himself of the benefit of the transportation offered him under his contract, and at the same time withhold from the carrier the effective evidence of the payment of his fare, *i. e.*, the ticket. If he desires to repudiate the contract on his part, he must do so *in toto*. He cannot appropriate its benefits and get rid of its burdens. 1 Whart. Cont., §§ 233, 552.

When the carrier proffers transportation without a seat, and the passenger refuses to surrender his ticket, what is then the attitude of the parties under the contract? It is simply this: The carrier has offered the passenger less than his contract calls for and the passenger has refused it in satisfaction. This he has the unquestioned right to do. If he is not accommodated in a manner which may be deemed a fair compliance with the duty of the carrier, he may decline any compromise and resort to his action against the company for refusing to carry him as their contract or their duty requires. But he cannot accept the part that is offered him in lieu of the whole—that is the transportation without the seat—and at the same time refuse to comply with his own undertakings, in this any more than another contract. Upon the carrier's neglect or refusal to comply with the terms of the contract of carriage, without a just excuse, the passenger is at liberty to treat the contract as violated by the company, and he may leave the train and sue for a breach of the contract.

It is not necessary to enter upon the determination, in this case, of the question whether he may not remain upon the train on compliance with the reasonable regulations of the company, without waiving his right to recover damages under the contract for the inconvenience of riding without a seat. However that may be,

if he chooses to accept passage without a seat he must pay the fare for it. 2 Redf. Ry. 257 (see VII, § 198); Benj. Sales, § 690. If he goes on the train expecting to receive the accommodation he has contracted for, and is put off because he declines to deliver his ticket or pay fare without receiving the full measure of what he is entitled to under his contract, he may maintain his action upon the contract and recover any damages that are the proximate result of its breach, just as though he had disembarked of his own will. But if he is ejected without unnecessary force or violence because of his refusal to pay for his ride, the carrier has done nothing more than it has the legal right to do, and no recovery can be had for the ejection. *Davis v. Railroad*, 53 Mo. 317; Thompson Car. 67; 2 Rorer Railr. 698-9; Redf. Ry. *supra*.

The case was tried in the Circuit Court solely as an action of tort, and the recovery was had upon the theory that the appellant had been unlawfully expelled from the train, the court instructing the jury that the company could not lawfully expel him if they "knowingly received him as a passenger, and then failed to furnish him a seat." This, as we have seen, was error.

The judgment must be reversed and cause remanded for a new trial.

Judgment reversed and cause remanded.

FEE V. COWDRY.

(45 Ark. 410.)

Constitutional law — betterment act.

An act providing that the occupant of land, who holds under color of title, and in good faith, believing himself to be the owner, makes improvements and pays taxes thereon either before or since the passage of the act, cannot be dispossessed without compensation for the improvements and taxes, is constitutional; and this though he owned the life estate at the time of the improvements, if he held under a deed for the fee and supposed he owned the fee.

THE opinion states the case.

W. F. Pace, for appellants.

L. Gregg, for appellees.

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BATTLE, J. Strother C. Myers purchased the land in controversy, on the 1st day of August, 1853, and took possession and held it until about the 1st day of July, 1869, when he died intestate, without wife, children, father or brothers surviving him. He left his mother, Margaret Myers, and three sisters, and the descendants of a deceased sister, his heirs-at-law. Margaret Myers became the owner of the land for and during her natural life. She died the 5th day of September, 1882. Appellants, who are the sisters and the descendants of the deceased sisters of Strother C. Myers, thereupon became entitled to the possession of the land and to hold the same in fee simple.

On the 24th day of November, 1871, Margaret Myers undertook and pretended to convey the land in controversy, in fee simple, to William H. Kellow, and he conveyed to W. B. Camp, sometime during the year 1873. Camp, representing that he had a good title to the land, on the 24th day of July, 1875, for a valuable consideration, pretended to convey the same, by warranty deed, in fee simple, to W. Q. Sewell, one of the defendants and appellees herein. Sewell thereupon took possession of the land and has at all times thereafter held the same. After this, and during the life-time of Margaret Myers, he made and erected on the land lasting, permanent and valuable improvements. When he bought the land and made the improvements he believed he owned it in fee simple. He paid taxes on the land, since the death of Margaret Myers, to the amount of \$50. The improvements made by him are worth the sum of \$762.50, and the rents since the death of Margaret Myers and down to the date of the judgment herein amount to the sum of \$87.50.

The court below rendered judgment in favor of appellants, and against Sewell for the land and costs, and ordered that no writ for the possession of the land issue in favor of appellants until payment of the sum of \$725, the balance due for improvements and taxes after deducting amount due for rents, shall be made to Sewell.

The judgment of the court below is based upon section 2644 of Mansfield's Digest, which says: "If any person, believing himself to be the owner, either in law or equity, under color of title, has peaceably improved or shall peaceably improve any land which upon judicial investigation shall be decided to belong to another, the value of the improvement made as aforesaid, and the amount of

all taxes which may have been paid on said land by such person, and those under whom he claims, shall be paid by the successful party to such occupant, or the person under whom or from whom he entered and holds, before the court rendering judgment in such proceeding shall cause possession to be delivered to such successful party."

Is this statute constitutional? Similar statutes have been in force in many of the States for some time, "and have been so uniformly held constitutional that we consider ourselves bound by the great weight of authority in their favor." The following are some of the numerous cases in which such laws have been held constitutional. *Ross v. Irving*, 14 Ill. 171; *Whitney v. Richardson*, 31 Vt. 306; *Armstrong v. Jackson*, 1 Blackf. 374; s. c., 12 Am. Dec. 225; *Fowler v. Holbert*, 4 Bibb, 54; *Jones v. Carter*, 12 Mass. 314; *Sanders v. Wilson*, 19 Tex. 194; *Brackett v. Norcross*, 1 Greenl. 89; *Hunt's Lessee v. McMahan*, 5 Ohio, 79; *Dothage v. Stewart*, 35 Mo. 251; *Love v. Shortzer*, 31 Cal. 487.

But the statute of this State is different from the betterment laws of some of the States, in this: It gives to occupants the right to compensation and to hold possession of land on account of improvements made before its enactment. It is contended that it thereby divests vested rights, and requires the owner to pay for improvements, which at the time of its enactment rightfully belonged to him. Is it unconstitutional in this respect?

"Private rights," says Judge Cooley, "may be interfered with by either the legislative, executive or judicial department of the government. The executive department, in every instance, must show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers. The legislative department may in some cases constitutionally authorize interference, and in others may interpose by direct action * * * But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another, for the private use and benefit of such other person, whether by general law or by special enactment. The purpose must be public, and must have reference to the needs or convenience of the public. No reason of general public policy will be sufficient, it seems, to validate such transfers when they operate upon existing vested rights.

"Nevertheless, in many ways remedial legislation may affect the control and disposition of property, and in some cases may change

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the nature of rights, give remedies where none existed before, and even divest the legal titles in favor of substantial equities, where the legal and equitable rights do not chance to concur in the same person.

"The chief restriction upon this class of legislation is, that vested rights must not be disturbed; but in its application as a shield of protection, the term 'vested rights' is not used in any narrow or technical sense or as imparting a power of legal control merely but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not as has been justly said, 'introduced as the result of princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm.'

"But as it is a right which rests upon equities it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all." Cooley Const. Lim. 356, 357.

Upon the principle that the legislature may interfere with private property for the purpose of adjusting "the equities of the parties as near as possible according to natural justice," the betterment laws of many States have been sustained.

In speaking of the betterment statutes of Vermont, in *Whitney v. Richardson*, *supra*, the court said:

"The right of the occupant to recover the value of his improvements does not depend upon the question whether the real owner has been vigilant or negligent in the assertion of his rights. It stands upon a principle of natural justice and equity, viz., that the occupant, who in good faith, believing himself to be the owner, had added to the permanent value of the land by his labor and his money, is in equity entitled to such added value; and that it would be unjust that the owner of the land should be enriched by acquiring the value of such improvements without compensation to him who made them. This principle of natural justice has been very widely, we may say, universally recognized."

"Betterment laws, then," says Judge Cooley, "recognize the existence of an equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made; but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed *in statu quo*, and the statute accomplishes justice as near as the circumstances of the case will admit, when it compels the owner of the land * * * to pay the value" of the betterments "to the person at whose expense they have been made. The case is peculiar; but a statute cannot be void as an unconstitutional interference with private property which adjusts the equities of the parties as near as possible, according to natural justice." Cooley Const. Lim. 389.

If the occupant, who in good faith, believing himself to be the owner, has made improvements on the lands of another, after the enactment of the statute, is in equity and justice entitled to pay for such improvements before he should be dispossessed, it is equally true that he is in equity and justice entitled to be paid for improvements he made in like good faith on lands of another, which he believed was his own before the enactment of the statute, before he should be dispossessed. If the constitutionality of the statute, affording relief in one case, can be sustained, upon the same principle and by the same argument its constitutionality can be proved in the other. In speaking of the constitutionality of the betterment laws of Massachusetts, Chief Justice PARSONS said: "The demandant has not contested the constitutionality of this statute, so far as it may affect actions sued after its passage, but denies it as affecting actions pending at that time. We see no ground for this distinction; and if it were competent for the legislature to make these provisions, to affect actions after to be commenced, the same provisions might apply with equal authority to actions then pending." *Bacon v. Callender*, 6 Mass. 308.

There is no clause in the Constitution of this State or the United States inhibiting the legislature from enacting a statute, retrospective in its operation, like the one under consideration, allowing ejected occupants of land to recover the value of improvements made by them while in possession and before the passage of the act. This being true, the power of the legislature to enact such a

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law results as a necessary consequence, "for it is incontrovertibly true, the legislature may enact any law, the passage of which is not expressly or impliedly forbidden by either the Constitution of this State or that of the United States." *Abder v. May*, 2 Paine, 74; *Fowler v. Halbert*, 4 Bibb, 52; *Brackett v. Norcross*, 1 Greenl. 92; *Bacon v. Callender*, 6 Mass. 303.

The betterment statute of this State is therefore constitutional, and Sewell is not precluded from its benefits because his improvements were made before its enactment.

Another question arises. The improvements were made during the life-time of Margaret Myers, and before the life estate inherited by her determined. Is Sewell entitled to compensation for the improvements under the statute? As a general rule improvements made by life tenants during the existence of the life estate are referred to their interest in the land, and for them they would not be entitled to compensation. But it is different in this case. For a valuable consideration Camp pretended to convey to Sewell, in fee simple, by warranty deed, the land in controversy. Sewell believed that he thereby became the owner in fee simple. In this faith he peaceably made valuable and lasting improvements. Under this state of facts is he entitled to pay for the improvements?

A similar question arose under a Massachusetts statute in *Plimpton v. Plimpton*, 13 Cush. 458, which says: "If the demanded premises have been actually held and possessed by the tenant in the action, and by those under whom he claims, for six years next before the commencement of the action, he shall in case of judgment against him be entitled to compensation in the manner hereafter provided, for the value of any buildings or improvements made or erected on the premises by himself, or by any person under whom he claims. The tenant shall also be entitled to like compensation, although the premises should not have been so held so long as six years, provided he holds them under a title which he had reason to believe good." The land in controversy in that case was conveyed to the tenant by a deed, purporting to convey in fee simple. The tenant took possession and claimed the entire interest in the land. It was however adjudged in that case that he only acquired a life estate. Improvements were made during the existence and after the termination of the life estate. The case was referred to an assessor to report the value of improvements. He allowed the tenant compensation for the improvements made during and after

the life estate. The demandants contended that the assessor erred in computing any thing for improvements made during the existence of the life estate. Chief Justice SHAW, in delivering the opinion of the court, after finding that the tenant made the improvements under a conveyance which he had reason to believe vested the title in fee simple in him, said: "On this ground therefore, as well as the former, we think the tenant entitled to betterments upon the principles relied on by him; and the assessor having taken the same view of the relative rights of the parties, and assessed the compensation for improvements, on these principles, his report is accepted and judgment is to be rendered for the demandants, with allowance to the tenants for betterments, in conformity with the report."

In *Wales v. Coffin*, 100 Mass. 177, the same question arose again under the same statute. Justice HOAR, delivering the opinion of the court, said: "The effect of the decision in *Plimpton v. Plimpton* is in short that the possession of a tenant may be so far adverse as to entitle him to compensation for betterments, although he holds a limited estate which entitles him to the possession at the same time, so that his possession does not constitute a disseisin of the tenant in remainder; if his holding is not in fact and intent under the partial and rightful title, but under a claim of the entire interest; * * * and it was decided further in *Plimpton v. Plimpton*, that the fact that the tenant had a good estate for life would not defeat the claim for betterments, if he had reason to believe that he had a title in fee;" and held accordingly.

The statute of this State is more liberal than the Massachusetts statute. Under the Massachusetts statute the occupant must hold "under a title which he has reason to believe good," before he can recover compensation for improvements. Under the statute of this State he must be a *bona fide* occupant and hold under a "color of title."

Was Sewell a *bona fide* occupant? In *Green v. Biddle*, 8 Wheat. 79, Mr. Justice WASHINGTON, in delivering the opinion of the court, said: "He is one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably this character cannot be maintained for a moment after the occupant has notice of an adverse claim, especially if that be followed up by a suit to recover the possession. After this he be-

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comes a *mala fide* possessor, and holds at his peril and is liable to restore all the means profits together with the land."

Sewell was a *bona fide* occupant; and unquestionably held under color of title. He did not hold under the partial and rightful title of Mrs. Myers, but under a claim of the entire interest; and the improvements made by him are not referable to the life estate inherited by Mrs. Myers, but to his claim of the entire interest. If he had taken nothing by his deed he would most unquestionably have been entitled under the statute to compensation for his improvements. The failure to get what he had purchased and intended to hold and improve, and believed he had held and improved, but something else, should not defeat his right to compensation for the improvements.

The judgment of the court below is affirmed.

Judgment affirmed.

MEYER V. ROBERTS.

(46 Ark. 50.)

Statute of frauds — contract not to be performed in a year.

An oral contract for services not to be completed in a year is void, although made subject to determination sooner on the happening of a certain event.

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

J. M. & J. G. Taylor, for appellant.

N. T. White and *U. M. & G. B. Ross*, for appellee.

SMITH, J. Roberts complained that on the 13th of October, 1882, he had been employed by Meyer as a manager of his plantations, for the remainder of that year and also for the following year, provided neither of the parties should object on the 1st day of January, 1883, to the continuance of the arrangement; that his stipend was to be \$100 per month, beside being furnished with a house to live in and his horse to be fed at his employer's expense; and that he continued to serve without objection until the 1st of May, 1883, when he was discharged without cause, to his damage \$600.

The answer alleged that the hiring was only from month to month, and set up the statute of frauds.

The jury returned a verdict of \$400 for the plaintiff.

The exceptions to the charge of the court being general, not designating the objectionable portions, we confine our review to the sufficiency of the testimony to support the verdict, discarding all of the evidence adduced which tended to sustain the defendant's version of the contract.

Roberts testified that Meyer wished to engage his services for five years, but he declined on the score of health to enter into so extended an engagement. The parties finally came to terms on the 13th of October, 1882. It was orally agreed that he should undertake the superintendence of the defendant's planting interests until the 1st of January ensuing, and that if his health permitted and the defendant was satisfied he should continue in his employment for the year 1883, for the compensation mentioned in the complaint. When the 1st of January arrived, Meyer expressing no dissatisfaction and no communication or additional understanding having been had then or afterward between them in relation to such employment, he continued to serve in the same capacity. In the latter part of April, Meyer, by letter, dismissed him from his service, assigning as a reason his inability to pay such high wages. Meyer paid him down on the first of May, but the plaintiff notified him that he considered himself hired for the year, and that he stood upon his legal rights and the terms of the contract. Being thrown out of employment in the middle of the season, the plaintiff had been unable to obtain a place until the 10th of September, when he secured a situation at \$75 per month. Another witness swore that in the beginning of the year 1883 he had intended to propose to Roberts a copartnership in farming, but received information from both the parties to this action that he was engaged for the year by Meyer.

Section 3371 of Mansfield's Digest enacts that no action shall be brought to charge any person upon any contract that is not to be performed within one year from the making thereof, unless the contract or some memorandum or note thereof shall be made in writing and signed by the party to be charged or his agent.

The decisions upon this clause of the statute cannot all be reconciled. But ever since the case of *Peter v. Compton*, Skinner, 353; s. c., 1 Smith Lead. Cas. (8th ed.) 614, it has been considered set-

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tled that the statute applies only to agreements which appear from their terms to be incapable of performance, or such as the parties never contemplated should be performed within the year. Consequently where the duration of the agreement depends upon a contingency, as the death or marriage of one of the contracting parties, a note in writing is not necessary; for the contingency may happen, and thus the contract be fully performed within a year from the time it is made. So a contract determinable at any time by either party is a contract which is to last during the pleasure of the parties or so long as they are mutually satisfied.

But a contract for personal services to continue and hold the parties together for a longer period than one year is plainly within the statute. Thus if at Christmas I orally hire a servant for a year, to begin from New Year's day, when he presents himself at the time appointed in fulfillment of that contract, I am not legally bound to receive him into my service; and if I do receive him, may afterward discharge him without incurring any other liability than the payment of his wages for the time he actually served. *Bracegirdle v. Heald*, 1 Barn. & Ald. 721 (4 E. C. L. R.), 342; *Snelling v. Lord Huntingfield*, 1 Cr. Mees. & Ros. 19; *Hill v. Hooper*, 1 Gray, 131; *Tuttle v. Swett*, 31 Me. 555; *Sutcliff v. Atlantic Mills*, 13 R. I. 480; s. c., 43 Am. Rep. 39; *Kelly v. Terrell*, 26 Ga. 551; *Amburger v. Marvin*, 4 E. D. Smith, 393; *Nones v. Homer*, 2 Hilt. 116.

Nor does it make any difference that the contract, if for more than a year, is subject to determination sooner on a given event. This is illustrated by the case of *Dobson v. Collis*, 1 Hurl. & Nor. 81, where a travelling agent was employed for two years with a proviso that the contract might be determined on three months' notice. POLLOCK, C. B., stated that the object of the statute was to prevent contracts not to be performed within the year from being vouched by parol evidence, when at a future period any question might arise as to their terms, and that a contract was not the less a contract not to be performed within a year because it might be put an end to within that period. And ALDERSON, B., observed: "When once the contract exceeds the year, the circumstance that it is defeasible will not make it other than a contract for more than a year. See the absurdity of holding otherwise; at the end of two years and a half one of the parties might claim a right to put an end to a parol contract for five years by giving three months' notice; but the very subject of dispute might be whether or no he

had a right to give such notice. That shows that this is a contract within the statute."

Here was an absolute agreement to take charge of the defendant's business from October 13, 1882, to the end of the calendar year; and a further conditional agreement for the year 1883, which might have been annulled by either party on the 1st of January, 1883. If not annulled, the agreement could not possibly have been performed within a year from the making of it.

Beeston v. Collyer, 4 Bing. 309; 13 E. O. L. 517, relied on by the plaintiff, is distinguishable. There a clerk had been hired by an army agent for a year, beginning on the 1st of March, but had remained in service for more than twenty years. He was dismissed without cause on the 23d of December, and it was held that his salary must be paid until March. This was upon the ground that the original hiring having been by the year, and the parties having gone on for a long time without any new arrangement, the law would imply from the circumstances a fresh contract for the same length of time at the commencement of each year. But in the present case there was an express contract for the year 1883; and the law does not readily imply contracts between parties when they have covered the same subject matter by their express agreement.

Moore v. Fox, 10 Johns. 243; s. c., 6 Am. Dec. 338, was an action by the minister of a church to recover from one of his members for two years' services as a minister. The proof was that the defendant, about six years before, had verbally promised to pay the plaintiff \$3 a year, and had continued to pay at that rate, in semi-annual installments, until the last two years. And a recovery was allowed. But the action was brought on a bygone or executed consideration, and the statute did not apply. The plaintiff had continued to preach in the same church and to the same congregation. The defendant had enjoyed the benefit of his ministrations, although apparently he had not profited by them. The acceptance of a benefit, even under an invalid contract, obliges the party to pay for it.

There is however a case in 19 Hun, 234, *Smith v. Conlin*, decided by a divided court, which if correct would lead to an affirmance of the judgment. In October, 1876, the plaintiff entered into a verbal agreement with the trustees of a school district to teach a school for the year, ending October 1, 1877, at a fixed salary, and for a

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further term of one year, at the same salary, to begin on the last-mentioned day, if no notice to the contrary should be given by either party, at least two weeks prior to that date. Such notice not having been given, the plaintiff continued his services for a few weeks into the second year when he was discharged. He claimed and was permitted to recover his salary for the entire year.

This is certainly contrary to the rule established in England by a long course of decisions, that an option to determine at any time a contract for a designated period exceeding a year has no effect in taking the case out of the statute of frauds.

As the plaintiff's contract extended over a period of more than a year, and could not in the nature of things have been completed within a year from the time it was made, and as it was not manifested by any writing, there is no competent evidence to warrant the verdict.

Reversed and remanded for a new trial.

Judgment reversed and cause remanded.

RECTOR V. COLLINS.

(46 Ark. 167.)

Reformation of contract — mistake of law.

Where a promissory note was executed payable with interest at a conventional rate, in excess of the legal rate, and the parties intended it to bear the same interest after maturity, but supposed that the law implied it, *held*, that chancery would not reform the note by adding the words "until paid," but if the maker has paid that rate after maturity, he cannot recover back the excess.

ACTION on a note and to enforce a vendor's lien. The head-note states the case. The plaintiff had judgment below.

F. W. Compton, for appellant.

U. M. & G. B. Rose, W. M. Cravens, and W. H. H. Clayton, for appellees.

BATTLE, J. [Omitting statement.] First. Appellant insists that the court below "erred in refusing to reform the notes for the pur-

chase-money of the bargained premises, so as to make them bear interest at the rate of 10 per cent per annum, after as well as before maturity."

In *Carnall v. Wilson*, 14 Ark. 487, Mr. Justice WALKER, in delivering the opinion of this court, said: "The evidence upon which a written instrument or contract is altered or corrected must be clear and free from doubt. In *Henkle v. Royal Exchange Ins. Co.*, 1 Ves. 317, Lord HARDWICKE said the court had jurisdiction to relieve in respect to plain mistakes in contracts in writing. In *Ingram v. Child*, 1 Bro. 94, Lord THURLOW said, 'that a mistake creating an equity dehors the deed should be proven as much to the satisfaction of the court as if admitted.' Judge STORY, in *United States v. Monroe*, 5 Mason, 577, said, 'in cases of asserted mistakes in written instruments, it is not denied that a court of equity may reform the instrument, but such a court is very slow to exercise such an authority, and it requires the clearest and strongest evidence to establish the mistake. It is not sufficient that there be some reason to presume a mistake; the evidence must be clear, unequivocal and decisive.' And in *Gillespie v. Moon*, 2 Johns. Ch. 585, Chancellor KENT reviews many of the English decisions, and fully recognizes the rule that in all such cases the mistake must be clearly and fully proven."

There was no evidence that the notes were not written as intended by the parties, or that they fail to express the real agreement between the parties made before their execution. It is however in evidence that there was a mistake as to their legal effect.

It is said in *Kerr on Fraud and Mistake*, 428: "Though the court will rectify an instrument which fails through some mistake of the draughtsman in point of law to carry out the real agreement between the parties, it is not sufficient to create an equity for rectification that there has been a mistake as to the legal construction, or the legal consequences of an instrument. The proper question always is, not what the document was intended to mean, or how it was intended to operate, but what it was intended to be. For an example, where an annuity has been sold by the plaintiff, and was intended to be redeemable, but it was agreed that a clause of redemption should not be inserted in the deed, because the parties erroneously supposed that its insertion would make the transaction usurious, it was held that the omission could not be sup-

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plied in equity, for the court was not asked to make the deed what the parties intended, but to make it that which they did not intend, but which they would have intended had they been better informed. So also where a party making a voluntary deed supposes that he will have a power of subsequent revocation, though no such power is reserved, the deed cannot afterward be rectified by inserting the power, the evidence merely showing that the power had been omitted under the erroneous belief that it was not necessary to insert it, not that the power was intended to be inserted, but was left out by mistake."

In 2 Pom. Eq. Jur., § 843, it is said: "The rule is well settled: that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal results of an act which he performs, is no ground for either defensive or offensive relief. If there were no elements of fraud, concealment, misrepresentation, undue influence, violation of confidence reposed, or of other inequitable conduct in the transaction, the party who knows, or had an opportunity to know the contents of an agreement or other instrument, cannot defeat its performance, or obtain its cancellation or reformation, because he mistook the legal meaning and effect of the whole, or of any of its provisions. Where the parties with knowledge of the facts, and without any inequitable incidents, have made an agreement or other instrument, as they intended it should be, and the writing expresses the transaction as it was understood and designed to be made, then the above rule uniformly applies; equity will not allow a defense, or grant a reformation or rescission, although one of the parties, and as many of the cases hold both of them may have mistaken or misconceived its legal meaning, scope and effect. The principle underlying this rule is, that equity will not interfere for the purpose of carrying out an intention which the parties did not have when they entered into a transaction, but which they might, or even would, have had if they had been more correctly informed as to the law; if they had not been mistaken as to the legal scope and effect of their transaction."

There was no error in the refusal of the court to reform the notes.

Second. In ascertaining the indebtedness of Collins to plaintiff, the court below credited Collins with the sum of \$6,004.05, as so much interest paid by him, after the maturity of the notes, in ex-

cess of six per cent. We find no evidence on which this action of the court can be based.

[Omitting the question of fact.]

Was Collins entitled to any credit for any amount paid on interest after the maturity of the original notes in excess of six per cent? Appellant insists he is not.

In *Bank of U. S. v. Daniels*, 12 Pet. 32, Mr. Justice CATRON, in delivering the opinion of the court, said: "That mere mistakes of law are not remediable is well established as was declared in *Hunt v. Rousmanius*, 1 Pet. 1; and we can only repeat what was then said, that whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision. What is this case, and does it turn upon any peculiarity? Griffin sold a bill to the United States Bank at Lexington for \$10,000, indorsed by three of the complainants, and accepted by the other, payable at New Orleans; the acceptor, J. D., was present in Kentucky when the bill was made and there accepted it; at maturity it was protested for non-payment and returned. The debtors applied to take it up, when the creditors claimed ten per cent damages by force of the statute of Kentucky. All the parties bound to pay the bill were perfectly aware of the facts; at least the principals who transacted the business had the statute before them, or were familiar with it, as we must presume; they and the bank earnestly believing (as in all probability most others believed at the time) that the ten per cent damages were due by force of the statute and influenced by this opinion of the law, the \$8,000 note was executed, including the \$1,000 claimed for damages. Such is the case stated and supposed to exist by the complainants, stripped of all other considerations standing in the way of relief. Testing the case by the principle that a mistake or ignorance of the law forms no ground of relief from contracts fairly entered into, with a full knowledge of the facts; and under circumstances repelling all presumption of fraud, imposition or undue advantage having been taken of the party, none of which are chargeable upon the appellants in this case, and the question then is, were the complainants entitled to relief? To which we respond decidedly in the negative."

In *Samyn v. Phillips*, 15 Ohio St. 218, where under a statute of Ohio which provided that parties might stipulate in writing for interest at any rate not exceeding ten per cent yearly, and in caso

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no special rate was stipulated, interest at the rate of six per cent per annum should be allowed, a promissory note was executed which contained no stipulation as to interest, and a part of the interest thereon had been paid at the rate of ten per cent per annum. *Held*, that although in a suit upon the note, payment of so much of the interest as remained unpaid could not be enforced at a higher rate than six per cent, yet the interest which had been paid at the rate of ten per cent was not in excess, because it was at a rate for which the parties might have lawfully contracted under the statute, and should be allowed to stand without deduction. The court said: "In the case before us, there is no evidence of any contract for the payment of interest at a special rate, after the maturity of the debt, except the fact that such payments were from time to time made. Though such payments could not have been enforced for want of a contract evidenced as the statute required, yet so long as it was in the power of the parties to make such a contract valid by express written stipulation, it was equally in their power to make it valid by actual execution. In our judgment therefore the payments of interest made while the ten per cent law remained in force, were not in excess of the rate allowed by law at the time, and should have been allowed to stand without deduction; and to this extent the judgment of the court below will be modified."

It was not proven that Collins paid any interest under a mistake of fact, or that he was induced by fraud practiced upon him to do so. He is not entitled to any credit for excessive interest.

Decree reversed.

JONES V. NICHOLS.

(46 Ark. 307.)

Negligence — uninclosed pit — straying animal falling into it.

The defendant dug a pit under a cotton gin, near the highway, leaving it uninclosed, with corn and cotton seed scattered about it. The plaintiff's cow, turned out to commons remote from the gin, fell into it and was killed. *Held*, that defendant was liable.

ACTION for killing cow by negligence. The opinion states the case. The plaintiff had judgment below.

C. A. Leovers, for appellant.

T. C. Humphrey, for appellee.

COCKRILL, C. J. The appellants were the owners of a cotton gin and grist mill combined. The building was set upon posts, leaving the space beneath open. In this open space they dug a pit for their cotton press. The appellee's cow fell into the pit and was killed. He sued the appellants and obtained judgment for \$40, the value of the cow. The appeal is prosecuted to reverse this judgment.

It seems that the bill of exceptions does not contain the entire charge of the court to the jury, but only such parts as the appellants saw fit to except to, together with their requests for instructions which were rejected by the court.

The entire charge should be set out. It would be manifestly unfair, in many instances, to judge the charge by an isolated part of it; and in order to determine correctly whether it was error to refuse to instruct the jury as requested, we should be informed what instructions were given. It often happens that a request to charge the jury is properly refused, though in itself unobjectionable, because the same phase of the case is already covered in the intended charge. It is not error to refuse to multiply instructions on a single point, and as every reasonable presumption is indulged in favor of the action of the trial court, we infer in a state of record like this; that the court declined to give the instructions asked if they are in themselves unobjectionable, because the jury were already sufficiently instructed on the points touched by them. Error to reverse a judgment must appear affirmatively, otherwise every thing is presumed to have been rightfully done.

It is not necessary however to indulge in any presumptions in order to affirm the judgment in this case. The pit, which the appellants dug and into which the cow fell, in the nighttime, was close to the highway; it was uninclosed and was without signal of warning or protection; moreover, cotton seed and corn had been left by the appellants scattered in the neighborhood of it, so that in the language of one of the witnesses, it was not only a stock trap but was actually baited for the game. The court instructed the jury in effect, that if they should find such a state of facts from the proof, the appellants were guilty of negligence

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which would render them liable for the injury done. This proposition cannot be controverted.

The appellee was not guilty of contributory negligence in turning his cow out upon the commons remote from the gin (*L. R. & F. S. Ry. v. Finley*, 37 Ark. 562), and there was no testimony upon which to base the instructions asked upon that point.

No objection was made at the trial to the introduction of any testimony, and the point now pressed cannot be made here for the first time.

Let the judgment be affirmed.

Judgment affirmed.

MEYER V. STONE.

(46 Ark. 210.)

Agency — to sell — implied power to collect.

▲ travelling agent to sell goods, who has not the possession of the goods, may still receive payment so as to bind his principal, where such is the general and known usage, and it has been recognized by the principal.

ACTION for price of goods. The opinion states the case. The defendant had judgment below.

B. R. Davidson, for appellant.

L. Gregg, for appellee.

COCKRILL, C. J. The appellants are merchants in the city of St. Louis. Their salesmen visit merchants in this State and elsewhere, and solicit orders for merchandise, and when successful forward the orders to their principals in St. Louis to be filled. The appellees who are merchants in the town of Fayetteville, in this State, purchased a bill of goods of the appellants through W. T. Barry, one of their travelling salesmen, the order being taken in the usual way, and the goods shipped by the St. Louis merchants to the appellees with an itemized account showing the indebtedness to them. A few days after the goods were received by the appellees, Barry called upon them for payment, and upon the receipt of the amount of the account, less a small discount, receipted the account in full in the name of his principals. The money thus

received by Barry never in fact reached the appellants, and they sued the appellees upon the account. The latter relied and succeeded upon the plea of payment.

No declarations of law were made or refused by the court, and the question presented is: Does the record disclose authority in Barry to receive payment for the goods and discharge the debt? It is not contended that he had express authority to do so, but it is contended that the authority to sell goods imports the authority to receive the proceeds of sales. The rule is frequently stated thus broadly by the authorities, but an examination of the cases will show that it is properly limited to a state of case where there are circumstances or appearances which give color to the belief in the purchaser that the authority exists; and when this is true, it is immaterial as to third persons whether the authority has been actually conferred or not, nor as to them apparent authority is real authority. *Jacobson v. Poindexter*, 42 Ark. 97.

The most usual instance of the principal being bound, in this class of cases, by the act of his agent, beyond the authority conferred, is where the agent contracting for the sale has possession of the property and delivers it to the purchaser, collecting the purchase-money contrary to instructions. In that case, the possession and delivery of the property clothe the agent with the *indicia* of authority to receive the purchase-price, and if the purchaser is not apprised of the limit placed upon the agent's authority, payment to the agent is payment to the principal. This incidental authority does not exist however if the agent is merely employed to negotiate a contract without possession of the property. The distinction is that long established between the authority of a factor and a broker. *Hill v. Crosby*, 39 Ohio St. 100; *Higgins v. Moore*, 34 N. Y. 417; *Berning v. Corrie*, 2 B. & Ald. 138; *Graham v. Duckwall*, 8 Bush, 12.

The Supreme Courts of Illinois, Missouri, Wisconsin and Michigan have held that salesmen employed by commercial firms to travel and solicit orders, or sell goods by sample, have no implied authority, where nothing more appears, to collect the purchase-money due their principals. *Clark v. Smith*, 88 Ill. 298; *Divessey v. Kellogg*, 44 Ill. 114; *Butler v. Dorman*, 68 Mo. 298; s. c., 30 Am. Rep. 795; *McKindley v. Dunham*, 55 Wis. 515; s. c., 42 Am. Rep. 740; *Koseman v. Donham*, 24 Mich. 36; see too *Johnson v. Craig*, 21 Ark. 533, 537; *Seiple v. Irwin*, 30 Penn. St. 513; *Law*

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v. Stokes, 32 N. J. (Law), 249; *Dunn v. Wright*, 51 Barb. 244; *Puttock v. Warr*, 3 Hurl. & N. 979.

The case of *Hoskins v. Johnson*, 5 Sneed, 469, which is perhaps the earliest reported case upon the authority of a "drummer" to collect the purchase-price of goods sold upon orders solicited by him, is not reconcilable with the doctrine of the foregoing cases. According to it the authority to collect the purchase-money is an incident to the power to negotiate the sale. It has been followed in *Collins v. Newton*, 7 Baxt. 269, and the case of *Putnam v. French*, 53 Vt. 402; s. c., 38 Am. Rep. 682, appears to be in accord with it; but it seems clear upon principle, that where goods are received by a purchaser from the vendors with a bill thereof payable to themselves, the bare fact that the order for the goods had been procured by an agent of the vendors, whose general duty it was to solicit such orders, would not raise the presumption that the agent was authorized to collect the purchase-price. In such a case payment to the agent is no defense to an action by the vendors for the purchase-money. But full validity may be given to the act of the agent in receiving payment, if there be a known usage of trade or course of business to justify the purchaser in making it. Story Agency, §§ 98, 413, 429; Lawson Usages and Customs, § 20, p. 49; § 142, p. 284.

In that case the presumption is that the agency was created with reference to the custom or course of business, and the ordinary reach of the agent's authority is thereby enlarged so as to cover the usual incidents of such an agency.

The proof in this case developed the fact that it was a general custom for commercial agents travelling like Barry to solicit orders to collect the purchase-money for the goods sold by them for their principals, and the proof was specifically directed to the custom of St. Louis agents. Isolated exceptions to the rule were proved, but in such instances the firm making the limitation indicated the fact in their bill or letter heads that payment must be made to them directly. Proof was had of the fact of two other of appellant's salesmen travelling at the same time as Barry, both of whom were in the habit of making collections as Barry did, in this instance, and remitting to the appellants. Barry himself it appears made collections from other customers of this house, and remitted the money to his principals from time to time, and no complaint was made by them of this exercise of authority, until his failure to

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remit the money paid him by the appellees. They did not before that time inform him or any one else that he had no authority to collect. Proof of the custom referred to was admissible, not for the purpose of enlarging the scope of Barry's agency, but in order to interpret his power under it, and the specific acts of payment by other merchants to Barry and the appellants' other agents tended to show their usual course of dealing with this class of agents, and to establish an actual knowledge on their part of the usage in this respect.

The jury, or rather the court acting in that capacity, was justified also in finding that the discount allowed the appellees was in accordance with the terms of sale made by the parties; that is that the purchaser had the option to retain the agreed price until the expiration of the term of credit without interest, or to deduct the customary discount if paid before. *Heisch v. Carrington*, 5 C. & P. 471; s. c., 24 E. O. L. 660. *Judgment affirmed.*

TURNER V. HUFF.

(48 Ark. 223.)

Carrier — delivery — notice to consignee.

A carrier by water cannot be held for loss of goods delivered at the proper landing place, although there is no warehouse there, and he gives no notice to the consignee, if such is the uniform usage, although neither shipper nor consignee knows the usage.

ACTION for goods lost. The opinion states the facts. The defendant had judgment below.

Rogers & Read and *Geo. W. Williams*, for appellant.

Sanders & Husbands, for appellees.

SMITH, J. Turner sued the owners of a steamboat for the value of a box of dry goods, which they had undertaken to carry, but had never delivered, as it was alleged. He recovered judgment before the justice of the peace, where his action was begun, but an appeal having been taken, was defeated in the Circuit Court.

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The bill of lading shows a contract of affreightment for the transportation of five boxes of boots and shoes, one package and one box of dry goods from Fort Smith to Childer's station, in the Cherokee nation, to be delivered to Turner on the levee. As Childer's station is four miles distant from the river, and as goods destined for that point must be hauled in wagons from the river, counsel agree that the obligation upon the carrier was to deliver at the nearest landing, which was Bray's, upon the river bank. In ascending the river to Webber's falls the boat put off at Bray's the rest of Turner's freight, but carried on the box, which gave rise to this controversy. However on its return trip next day, the box was carried ashore and deposited by the side of Turner's other goods, which had not yet been removed. Turner was not notified on either occasion by any officer or agent of the boat of the arrival of the goods; but received information from a teamster on the Sunday that the boat passed up that his goods were at the landing. Next day the same teamster saw the missing box on the landing with the rest of Turner's freight; in fact it was pointed out to him by Bray. There was no warehouse at Bray's, nor did the boat have any agent there. The testimony conduces to prove that there are no warehouses, wharf-boats or facilities for storing freight on the upper Arkansas, but that the custom is to blow the whistle to warn the neighboring settlers of the boat's approach and to discharge the freight for a particular landing on the bank of the river, without notice to the consignee. Bray lived near the landing and sometimes sheltered goods left there by the different boats that navigated the river when the weather was threatening; and was sometimes intrusted with the collection of special bills. He was usually requested to look after the freight and notify owners; but on this occasion was absent from home. This box of goods had never actually come to the hands of the plaintiff, and the main question was whether a delivery had been made according to the tenor and effect of the contract.

A carrier by water may deliver goods on the wharf; but as a general proposition the consignee is entitled to actual notice of their arrival, that he may have an opportunity to remove or safely store them. The necessity of notice may however be waived by the previous course of dealing between the parties. Here it was in proof that the plaintiff had previously received several consignments of freight by this same boat, which had been delivered on

the bank of the river, without any notice to him, and no complaint had been made.

Moreover it may be shown that the uniform usage and course of business of carriers in the same trade is to leave the goods at the landing place without notice; and that the manner of delivery adopted in the particular instance conformed to the custom of the locality. And this whether the usage was known to the shipper or consignee or not. Every person who contracts with another for services in his special trade is understood to contract with reference to the usages of that trade. Hutchinson Carriers, § 366, and cases cited in note.

Turner must have known the precise character of Bray's landing, the custom of the boats in delivering freight, and the want of facilities for the proper care and custody of it after it was left on the bank. He was a merchant trading in the vicinity, and this was his shipping and receiving point. If therefore he was unwilling to be bound by the delivery in accordance with the custom of the landing, he should have attended in person to receive his freight, or have designated an agent for that purpose.

In the case of *Mill Boy*, 13 Fed. Rep. 181, CALDWELL, J., in discussing the question, when is the carrier discharged from liability, when the contract is to carry to a neighborhood or way-landing where there is no wharf and no warehouse, and where the consignee does not reside and is not to be found, uses this language:

"Such landings are not uncommon on the rivers of the south-west. They are established or rather named by the settlers living in the vicinity for their own convenience, and to avoid the labor, expense and delay of travelling to some established wharf or landing, where the usual facilities for storing goods may be found. It is a well-known fact that on the Arkansas and other rivers in the south-west, the distance between the towns or established ports where there are warehouses or wharf-boats is often very great. The necessities and conveniences of the settlers imperatively require that their goods should be delivered on the bank of the river, as near their homes and plantations as practicable, regardless of wharves and warehouses. The practical sense and generous spirit of good neighborhood which characterized these settlers very soon devised means for accomplishing the desired ends.

"It was perceived at once that the rules governing the rights

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and duties of carriers by water, where the contract is to carry to some established port having a wharf or warehouse, and where the consignee resided or might be found, or where he could be speedily notified by telegraph or otherwise, could have no application to these country or way-landings. It was seen that a boat could not be required to lie at each one of these landings until the consignees appeared to receive their goods, or until notice of their arrival could be sent to them. To impose such an obligation on a boat would protract her voyage unreasonably and indefinitely, and no boat would receive goods consigned to a way-landing, if such an obligation had to be incurred. Accordingly, some spot deemed most favorable for a boat-landing would be fixed by the settlers and given a name. Some settler living at or near the landing, for the accommodation of his neighbors, would take it upon himself to notify them by some of those casual methods usual among people in the country, when goods were put off at the landing for them, and would assume such care and oversight over the goods in the meantime as good neighborhood and the necessities of the case seemed to require. And the usage and custom has been uniform that when the boat put off goods at such a landing in good order and condition, and the person living at or near the landing was notified of the fact and requested to look after them and notify the consignee, the liability of the boat was at an end. And the person in whose charge, in a very general sense, the goods may be said to be left at these landings, and who is expected to notify the consignee, is, as between the carrier and consignee, to be regarded as the agent or bailee of the latter, and not of the former, although no such relation may exist in fact between him and the consignee, or certainly none other than that of a bailee without award.

“The usage and custom relating to the delivery of goods at these landings is shown to have prevailed, and to have been generally known and uniformly acted upon, ever since boats have navigated the Arkansas river, now more than half a century. It is a reasonable usage, and contracts of affreightment will be presumed to have been made with reference to it. Persons consigning goods to such landings must therefore be held to know their character, and the usage and custom relating to the delivery of freight thereat.

[Minor point omitted.]

Judgment affirmed.

SIBLEY V. SMITH

(46 Ark. 373)

Evidence — physical examination of party for personal injury.

Where a plaintiff in an action for personal injuries alleges that they are permanent, the defendant is entitled as a matter of right, to have a surgical examination. But where the evidence of experts is already abundant, the court may refuse the examination, subject to review in case of abuse.*

ACTION for personal injuries. The opinion states the case

U. M. & G. B. Ross and J. M. Ross, for appellant.

S. P. Hughes, for appellee.

SMITH, J. Sandy Smith sued the receiver of a railroad corporation to recover damages for being forcibly ejected from a moving train. His complaint alleged severe external and permanent internal injuries, and he recovered a verdict and judgment for \$2,000.

The testimony for the plaintiff tended to show that he was a colored man, above sixty years of age — one of a party of emigrants that included his wife and step-children, besides others; that they had bought tickets from Dyersburg, Tenn., to Surrounded Hill, in this State; that after leaving Memphis on the road operated by the defendant, it being now dark, the conductor demanded the plaintiff's ticket, which was surrendered; but the conductor said it was not good, although the rest of the party were permitted to ride on similar tickets, purchased at the same time and place; that the plaintiff had been compelled, by threats and intimidation, to jump off the train and was thrown to the ground with great violence, sustaining contusions upon the head, right arm, shoulder and hip, and also being internally hurt, evidenced by frequent hemorrhages, and derangement and obstruction of the bowels; and that his health and capacity to labor had been seriously impaired by the fall. It did not appear that any medical man had been called in, until a long time after the injury was received; nor was any medical testimony given as to the nature and extent of the injuries.

* See note, 50 Am. Rep. 156.

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After the plaintiff had rested, the defendant moved the court that the plaintiff be required to submit to an examination of his person by experts chosen in equal numbers by the parties, whose fees the defendant offered to pay, with a view to ascertain the character, extent and permanency of the plaintiff's hurts. This motion was denied.

The earliest reported case on this subject, to which our attention has been called, is *Walsh v. Sayre*, 52 How. 334, decided by the Superior Court of New York in 1868. That was an action for malpractice against a surgeon, it being alleged that he had unskillfully performed an operation on the plaintiff, a child of seven years. The defendant asked that the plaintiff be required to appear and submit to a personal inspection of the affected part by himself and such other competent surgeons as he might name, under the direction of a referee to be appointed for that purpose. And it was held that the power of the court in the premises was analogous to the power to compel the discovery of books, papers and documents, in a case where a party to the litigation, knowing or having the means of knowing material facts, seeks to obtain an undue advantage by withholding and concealing the sources of information. And the judge who delivered the opinion after adverting to the natural delicacy which disposes the mind to shrink from such an examination, when the discovery asked is of a portion of the human body, proceeds to show that such investigations are not unusual in cases of mayhem, of divorce for impotency, and of alleged pregnancy.

This case was approved in *Shaw v. Van Rensselaer*, 60 How. Pr. 143. And the right of the court to order an examination in an action for personal injuries was considered unquestionable in *Harrold v. N. Y. R. Co.*, 1 Hun, 268.

An important authority upon the subject is the case of *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa, 375. Upon this question the court says: "The issues of the case involved the extent of the injuries inflicted upon the plaintiff, and their effect upon his health and strength. He testified upon the first trial that he was so far disabled that he could not engage in labor requiring the exercise of common strength and activity. The testimony was to the effect that his hip and back were the seat of great pain, that the injuries had impaired his nervous system, and that his limbs and some of his internal organs were to an extent paralyzed.

.. "After the jury were impanelled, and before the introduction of any testimony, the defendant filed a written application asking

that a proper order of the court be made, requiring the plaintiff to submit to an examination by physicians and surgeons, that they might determine the true condition of his health, and the character and extent of his ailments, to the end that it might be known whether indeed he was suffering from any disability, and if so found, whether it originated from the injuries sustained by the timbers falling upon him, as claimed by him in his petition and testimony. The defendant in its application asked that such an examination should be made by a proper number of physicians, to be selected in equal numbers by plaintiff and defendant, and it was proposed by the defendant that its own medical officer should not be one of the number, and that the expenses of such an examination would be paid by the defendant.

"Whoever is a party to an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. The right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor then to demand the whole truth is unquestioned; it is the correlative of the right to exact justice. * * *

"To our minds the proposition is plain that a careful examination by learned and skilled physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. * * *

"But it is urged that the court was clothed with no power to enforce obedience of the plaintiff, had such an order been made. Its power in our judgment was amply sufficient to coerce obedience. The plaintiff would have been ordered by the court, by submitting his person to examination, to permit the introduction of testimony in the case. His refusal would have been an impediment to the administration of justice, and a contempt of the court's authority. He would have been subject to punishment as a recusant witness who refused to answer proper questions propounded to him. Should such recusancy too long delay the court, or prove an effective obstruction to the progress of the case, the court could have stricken from the pleadings all the allegations as to permanent

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injury and withdrawn from the jury that part of the case. The plaintiff, by voluntarily withdrawing his claim for such injury, would have been relieved from the necessity of such examination, and proceedings as for contempt would have been suspended. When it is remembered that plaintiff was a witness before the court, that the examination of his person would have had the effect to elicit testimony from him, the power of the court over him is readily understood.

"It is said that the examination would have subjected him to danger of his life, pain or body, and indignity to his person. The reply to this is that it should not, and the court should have been careful to so order and direct. Under the explicit directions of the court the physicians should have been restrained from imperiling in any degree the life or health of the plaintiff. The use of anæsthetics, opiates, or drugs of any kind should have been forbidden, if indeed it had been proposed, and it should have been prescribed that he should be subjected to no tests painful in their character. As to the indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies. Those who effect insurance upon their lives, pensioners for disability incurred in the military service of their country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies, and it is never esteemed a dishonor or indignity. The standing and character of the physicians who should have been appointed to make the examination would not only have secured the plaintiff from insult or indignity, but would have been a guaranty that nothing would have been attempted which would have endangered his life or health. * * *

"It is the practice of the courts of this State, sanctioned by more than one decision of this court, to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounded or injured limbs, in order to show the extent of their disability or suffering. If for this purpose the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under proper circumstances, be required to do the same thing for a like purpose upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men."

Citing *White v. Milwaukee City R. Co.*, 61 Wis. 536; s. c., 50 Am. Rep. 154, and *Atchison, Topeka and Santa Fe R. Co. v. Thul*, 29 Kan. 466; s. c., 44 Am. Rep. 659, is also in point.

[Omitting extracts.]

Bryant v. Stillwell, 24 Penn. St. 317, was a suit on a building contract and the defense was that the house had been improperly constructed. Before the trial the plaintiff sent a person to examine the house, so that he might be able to testify how the work was done. The defendant refused to let him go through the house for the purpose. Judge BLACK, in the course of his opinion, said: "To smother evidence is not much better than to fabricate it. * * * It ought to be understood that where one party has the subject matter of the controversy under his exclusive control, it is never safe to refuse the witnesses on the other side an opportunity to examine it, unless he is able to give a very satisfactory reason. Here there was no ground to believe that the witness would misrepresent what he might see. If the defendant had felt such a suspicion, he could have shown the house to as many others as he chose, and overwhelmed the one perjured man by a host of honest ones."

The only case that militates against these views, that we are aware of, is *Lloyd v. H. & St. Jos. R. Co.*, 53 Mo. 509, where it is said: "The proposal to call in two surgeons and have the plaintiff examined during the progress of the trial as to the extent of her injuries is unknown to our practice and to the law. There was abundant evidence on this subject on both sides; any opinion of physicians or surgeons at that time would have only been cumulative evidence at best, and the court had no power to enforce such an order."

The refusal may have been proper enough in that case, as it appears that expert testimony had already been introduced, which in the opinion of the court was sufficient. But upon the question of power and the means of enforcing obedience to the order, the decision seems not to have been well considered. Courts have very efficient remedies in their hands for the punishment of reculant witnesses or parties to suits.

The rule to be deduced from these cases is that where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition—an opinion based upon personal examination.

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In refusing to order the examination, as it may do when the evidence of experts is already abundant, the Circuit Court must exercise a sound discretion; and its action is subject to review in case of abuse.

There could not be a more flagrant instance of the evils resulting from such a refusal than the present case affords. The plaintiff was an uneducated man, incapable of estimating the consequences of his injury, except by the pain and inconvenience which it had caused him. He was able to walk five or six miles the day after the injury, and indeed then stated that he had not been hurt at all. No physician attended him or testified on the trial. His claim for damages was based principally on alleged internal injuries which could only have been understood and properly estimated by a physician. The verdict must have been largely founded upon such injuries; for there were no visible wounds which the jury could appreciate. And yet the plaintiff was allowed to testify to great and permanent injuries, without the possibility of successful contradiction, the only means of ascertaining the real facts being denied to his adversary.

It was not disputed that the plaintiff leaped from the train while it was in rapid motion. The court referred it to the jury, under appropriate instructions, to say whether he acted voluntarily or from a fear, generated by the conduct of the conductor, that worse consequences might befall him if he attempted to remain in the car.

For the error aforesaid, the judgment is reversed and cause remanded for another trial.

Judgment reversed and cause remanded.

FORT SMITH V. DODSON.

(46 Ark. 296.)

Constitutional law — estrays.

A city ordinance, enacted under the authority of a statute, authorizing the impounding of hogs found running at large in the city, and their sale for costs and expenses, after public notice of sale, without further notice to the owner, is valid.*

* See *Wilcox v. Hemming* (58 Wis. 144), 46 Am. Rep. 625; note, 83 Am. Rep. 616.

ACTION for value of hog. The opinion states the case. The plaintiff had judgment below.

City attorney, for appellant.

Collins & Balch, for appellee.

COCKRILL, C. J. The marshal of the city of Fort Smith, finding a hog belonging to the appellee at large upon the streets of the city, seized and impounded it, and afterward sold it at public outcry. The appellee recovered judgment for the value of the animal in an action against the city. On the trial the city offered to justify the act by proving a sale under an ordinance passed by the council, authorizing the impounding and sale of swine found running at large, but the court ruled that the ordinance was invalid, and rejected the evidence offered. This ruling of the court is the only question pressed by counsel for determination.

The ordinance is said to be invalid because not within the power specifically conferred upon the council by the act of the legislature. Under the title of "General Powers of Cities and Towns," Mansf. Dig., § 757, is the following provision:

"They shall have the power to restrain and regulate the running at large of cattle, horses, swine, sheep and other animals within the limits of the corporation; to authorize the distraining, impounding and sale of the same, for any penalty imposed by any ordinance or regulation, and all costs of the proceeding."

In execution of the powers conferred by this provision, the council of Fort Smith passed the ordinance now in question. It forbids the running at large of hogs and other animals in the city limits; establishes a pound and authorizes the city marshal or policeman to cause any hog found running at large to be seized and impounded; it provides a reasonable fee for services performed in impounding, feeding and caring for the animal after seizure, and makes it the duty of the marshal to sell any impounded animal after giving five days' notice by posters in public places in the city—the proceeds of sale, after deducting the costs of seizure, impounding and keeping the animal, to be held for the benefit of the owner.

It is argued that where no penalty is imposed by the ordinance, no power to impound or sell any of the enumerated animals is conferred by the statute. This position assumes that the authority to impound and sell is granted only by that clause of the statute re-

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lating to the penalty, But this is a false hypothesis. The first clause of the section cited confers the power to "restrain and regulate the running at large" of the animals enumerated. These words alone confer authority to establish the customary means of preventing the evil aimed at, according to the familiar principle, that all power is implied which is necessary to give effect to that expressly conferred. *Town of Russellville v. White*, 45 Ark. 485; *Grover v. Huckins*, 25 Mich. 476; *Whitlock v. West*, 26 Conn. 406; *Goselink v. Campbell*, 4 Iowa, 296; *Varden v. Mount*, 78 Ky. 86; s. c., 39 Am. Rep. 208; *Whitfield v. Longest*, 6 Ired. 268.

Hogs and other animals running at large, contrary to lawful prohibition, are regarded in the light of a nuisance, and the usual and established method of suppressing the nuisance is by impounding the animals and causing a sale for the costs of the proceeding. *Cases, sup.* But the authority to impose a fine or penalty *in personam* upon the owner would not arise by necessary implication from the first clause of the section, and the obvious intention of the succeeding clauses in relation to the penalty, was to enlarge rather than to limit the power granted by the preceding clause, and enable the city not only to suppress the nuisance but to punish the person responsible for it. As the ordinance attempts only to suppress the nuisance, it does not reach the limit of the power granted, much less overleap it. But the ordinance may be justified under the second clause of the section also. The power is expressly given to sell for costs when a sale is made for a penalty. Now, as the costs referred to, by clear implication, include the costs of "distraining, impounding and sale," the question arises: Is it necessary to a valid exercise of this power that the council shall go to the full extent of the authority conferred, and impose a penalty for the nuisance before they can render an impounding effectual by a sale for the costs and charges? In answer to this question the Supreme Court of Michigan, in *Grover v. Huckins, supra*, in a case like this, say: "A party is not to be heard to complain, if in the punishment for a breach of the penal laws some severable part of what is or should be the legal penalty is omitted."

Again, it is urged that the ordinance forfeits the impounded animal without judicial proceedings and without "due process of law." The ordinance does not, strictly speaking, create a forfeiture, for after paying the reasonable expenses of impounding and selling, provision is made for paying the residue of the proceeds of

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sale to the owner of the animal. *Bagley v. Castile*, 42 Ark. 77. A notice, such as is likely under the circumstances to reach the party concerned, is required. This is all that is necessary in such cases. "In judging what is 'due process of law,'" said Mr. Justice BRADLEY in *Davulson v. New Orleans*, 96 U. S. 107, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements or none of these and if found to be suitable or admissible in the special case, it might be adjudged to be 'due process of law'; but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law.'" Such summary proceedings without the form of judicial trial have universally been held valid as falling within the police power of the government. *McKibbin v. Fort Smith*, 35 Ark. 352; *Gosselink v. Campbell*, *supra*; *Gilchrist v. Schmidling*, 12 Kans. 263; *Grover v. Huckins*, *supra*; *Campau v. Langley*, 39 Mich. 451; s. c., 33 Am. Rep. 414; *Moore v. State*, 11 Lea, 35; *Mayor of Cartersville v. Latham*, 67 Ga. 753; *Whitfield v. Longest*, *supra*.

The case of *Varden v. Mount*, *supra*, relied upon by the appellee seems to be an exceptional case in this particular line. The city ordinance in that case presented the same essential features as the Fort Smith ordinance, but the court assume that its provisions created a forfeiture of the impounded animal and proceeded to determine that that could not be done without a judicial investigation. Before the determination of this case, the Supreme Court of Kansas, in disposing of a similar question, used this language: "When nothing is attempted to be imposed upon the owner of the stock as damages or penalty, but only the reasonable cost of taking up, impounding and keeping the same, and sufficient notice is provided for, and the ordinance authorized by the city charter, it is believed that no court has ever held the law or the ordinance founded thereon to be unconstitutional or invalid, although the sale may not be made under judicial process, although there may be no provision for a judicial investigation, except the general remedies to determine whether the law or the ordinance had been complied with, and although the notice provided for may not be a personal notice, but only a notice by publication or by posting." This we think the correct view. Certainly no greater right to a judicial investigation exists in such a matter than in the case of an estray or the sale of real or personal property for non-payment of taxes.

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It follows that the court erred in excluding the evidence offered by the city in justification of the sale, and the judgment must be reversed and the case remanded for a new trial.

Judgment reversed.

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CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

MALLETT V. SIMPSON

(94 N. C. 37.)

Corporation — right to hold land.

Although a corporation is forbidden by its charter to hold real estate, yet a deed of land to it is valid until vacated by a direct proceeding by the State for that purpose.

ACTION to recover land. The opinion states the case. The plaintiff had judgment below.

C. M. Busbee, for plaintiff.

Jno. Devereux, Jr., for defendant.

ASHE, J. The only exception taken by the defendant on the trial was to his honor's ruling adversely to his contention, that under the 23d section of the Act of Incorporation, Laws of 1852, ch. 136, the railroad company was incapable of taking or making title to the land, and that the estate was in the heirs of Elijah Hardison, who was dead.

The section of the act, relied upon by the defendant as the ground of his exception, is as follows: "That the said company may pur-

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chase, have and hold in fee for a term of years, any lands, tenements or hereditaments which may be necessary for said road or the appurtenances therefor, or for the erection of depositories, store-houses, houses for the officers, servants or agents for the company, or for workshops or foundries to be used for said company, or for procuring stone or other materials necessary to the construction of the road, or for effecting transportation thereon, and for no other purpose whatever." But in connection with this section in ascertaining the powers conferred by the charter of the company, the fifth section of the act should be considered, in which it is declared that the company "shall be capable, in law and equity, of purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, acquiring the same by gift or devise, so far as shall be necessary for the purpose embraced within the scope, object and intent of this charter and no further." By the charter the corporation is empowered to purchase, hold and sell real property, for the purpose of "procuring stone or other material necessary to the construction of the road, or for effecting transportation thereon." In the absence of any evidence with respect to the use made of the land after its purchase by the company, it is to be presumed that the land purchased was acquired for the purpose authorized by the charter. The deed to the company covered the fee, and the company had the right to sell and convey the same. This principle is announced in the case of *Yates v. Van De Bogert*, 56 N. Y. 526, in which it was held, that "where a railroad company is authorized by its charter to acquire by purchase such real estate as may be necessary for the construction of its road, it will be presumed that lands deeded to it are acquired for that purpose. By a deed purporting to convey a fee it acquires title in fee, and when the land is no longer used for its purpose, it has the right to sell and convey the same."

But it is not necessary that the plaintiff should resort to such a presumption in this case in support of his title from the railroad company. For it was in evidence that the company bought the land in question in 1856, and held it for twenty-five years; that its road ran over the land, and that it was used by the company for the purpose of getting wood for fuel and cross-ties. These were materials certainly essential to the purpose for which the company was chartered.

The cross-ties were necessary to the construction of the road;

and its repairs, and the fuel was equally necessary after the road was constructed, in effecting transportation so that the purchase of the land by the company was strictly within the power conferred by the charter, and having used it for the purpose for which it was purchased, it had the right, under the fifth section of the act to sell it when it was no longer needed for that purpose.

But there is another view of the subject which is fatal to the contention of the defendant. Conceding that the railroad company had not purchased the land in question, nor used it for the purpose contemplated by the charter, the deed from Hardison to it vested the legal title, and its right to purchase and hold the land could not be collaterally assailed. No one but the State could take advantage of the defect that the purchase was *ultra vires*. This principle is fully sustained by the authorities. Like an alien who is forbidden by the local law to acquire real estate, he may take and hold title until "office found." *Fairfax Devises v. Hunter's Lessee*, 7 Cranch, 604.

At common law, corporations generally have the legal capacity to take a title in fee to real property. They were prohibited in England by the statutes of mortmain, but these statutes have never been adopted in this State, so that the common-law right to take an estate in fee, incident to a corporation (at common-law), is unlimited, except by its charter and by statute. But the authorities go to the extent that even when the right to acquire real property is limited by the charter, and the corporation transcends its power in that respect, and for that reason is incompetent to take title to real estate, a conveyance to it is not void, but only the sovereign, (here the State) can object. It is valid until assailed in a direct proceeding instituted by the sovereign for that purpose. *Leazern v. Hillegas*, 7 Serg. & R. 313; *Gonndie v. Northampton Water Co.*, 7 Penn. St. 233; *National Bank v. Whiting*, 103 U. S. 99; *Angell & Ames Corp.*, §§ 152-777; *Runyon v. Coster*, 14 Pet. 122. *Bank v. Poiteaux*, 3 Rand. 136.

The case of *Leazern v. Hillegas*, *supra*, was very similar to the one before us, in the facts and the questions of law involved. The plaintiff there claimed the land through the Bank of North America, by deeds of conveyance to and from said bank. The bank was restricted by its charter from purchasing land except for certain purposes, which it had transcended, and the defendant contended that the bank was incapable of purchasing and alienating the

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land. But the court held, "the bank might take independent of a provision in the act of incorporation, and that the title of the corporation, like that of an alien, would be defeasible only by the State. No one can take advantage of the defect (of title) but the State."

In Illinois it was held, that "when a corporation was authorized by its charter to purchase real estate for certain purposes, but for no other, a deed executed to it, by one having capacity to convey, vested the title in the corporation, and that such title could be assailed on the ground that the purchase was *ultra vires*, only by the State, or by a stockholder, but not by the grantee." *Hough v. Cook County Land Co.*, 73 Ill. 23.

The deduction from the authorities is, that if the corporation acquired the land for any of the purposes authorized by the charter, its purchase and sale were valid; and if on the other hand, it transcends the authority conferred by the charter, its purchase and sale would still be valid against every body except the State, and its title could not be collaterally assailed, as was attempted in this case.

[Minor point omitted.]

There is no error. The judgment of the Superior Court is affirmed.

Judgment affirmed.

BOYD V. TURPIN.

(94 N. C. 137.)

Fraud — estoppel of married woman by.

A son and his mother, a married woman, entered into an agreement to defraud his creditors, in pursuance of which he conveyed his lands to her, and in her name and as her agent contracted to sell them to a *bona fide* purchaser. After a portion of the purchase-money had been paid, she attempted to repudiate the contract, and sued to recover the land. *Held*, not maintainable.

ACTION to recover land. The opinion states the case. The plaintiff had judgment below.

George A. Shuford, for defendants.

SMITH, C. J. The facts ascertained by the jury, in connection with the admissions of the parties, are in substance as follows:

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One W. Boyd, whose full name for brevity we omit, a son of the plaintiff, who at the time of the transactions which gave rise to the controversy was a married woman, being in debt, entered into a covinous agreement with her, in order to place his property beyond the reach of creditors, and to defraud them of their just rights, he was to cause such lands as he might thereafter buy, and particularly the two tracts demanded in the action, to be conveyed to her, and he was to act in her name and as her agent in making both the purchases and dispositions of them. In carrying out the fraudulent arrangement, the tracts described in the complaint, the title to which had been vested in her, were contracted by him to be sold to Linda Messer and her children, eight in number, for the price of \$500, to be paid in semi-annual installments of \$50 each, and to this end, he executed a bond for title to them, describing the said Linda as guardian of the others, wherein it is stipulated that the two tracts or one of them (for there is an apparent repugnancy in the terms of the condition), shall be conveyed to the vendees on payment of the purchase-money. This instrument purports to be the bond of the plaintiff, and concludes in these words:

“Given under our hands and seal, this the 1st day of February, 1877. ELIZABETH BOYD, (seal).

H. H. BRADLEY.

Done by W. J. G. B. BOYD, Agent.”

On this contract, payment in two notes, one of \$200, and the other of \$155, in the aggregate \$355, have been made by said Linda to said agent.

The bond for title with its equities, by successive assignments from all but three of the obligees (and of those assigning, some were under coverture at the time), has been transmitted to the defendant. The several assignees accepted the bond in good faith, and under assurances from the agent that there remained due only \$100 of the purchase-money, in full confidence of the truth of the representations thus made in answer to their direct inquiries.

The jury, under directions to which exception was taken by the defendant, in response to issues submitted by them, find and declare that the said W. Boyd was not, at the time of the sale, sole owner of any beneficial interest in the land, nor has he now any in the result of the suit.

It was conceded that the agency was constituted by parol and without any writing under seal.

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The instructions complained of are in an abbreviated form to this effect: While a conveyance made by a debtor, with intent to avoid payment of his debts, or to defeat the claims of creditors, would be void at the election of the latter, it was only void and inoperative against creditors, but would be effectual to pass the estate as between the parties to the transaction, and no evidence had been offered to show the defendant to be such creditor. In such case, Boyd was not sole owner of a beneficial interest in the premises, when he undertook in the plaintiff's name to make the contract, nor has he now an interest in the fruits of a recovery.

The ruling upon the invalidity of the writing, put in the form of a bond of the plaintiff, is entirely correct. It has no binding force as a contract upon either the plaintiff or the agent; not upon her, by reason of the disability of coverture, and this removed, for want of authority under a sealed instrument to enter into the obligation; not upon him, because upon its face the contract purports to be her undertaking, and there are no operative words affecting him. *Sellers v. Streater*, 5 Jones, 261; *Fisher v. Pender*, 7 Jones, 483; *Holland v. Clark*, 67 N. C. 104.

The portion of the charge to which the defendant excepts, proceeds upon an obvious misconception of the equity set up against the plaintiff's legal right to evict the defendant, and to secure to him affirmative relief. The doctrine laid down by the court is in itself correct, with the addition that a conveyance infected with fraud is void as against a creditor who is pursuing legal process to enforce his demand and subject the fraudulently aliened property to its satisfaction. To such process it is no obstruction, and the attempted conveyance is void.

It is, though covinous, as effectual against an inactive creditor, when collaterally drawn in controversy, as against any one else, in transferring title. But if the principle had any application to the facts of the present case, it would be unavailing to the defendant, since if the deed to the plaintiff was void, and could be so treated, it would leave the title in the grantor, and equally beyond the reach of the defendant in the present action, as if no deed had been made. Moreover the rule annuls fraudulent deeds executed by the debtor, to place his property where access to it by final process cannot be had, so as to leave it still exposed to the claims of his creditors. *Peebles v. Pate*, 90 N. C. 348, and cases cited.

But this learning is foreign to the present controversy. The de-

fendants' asserted equity grows out of the fraudulent contrivance by which the agent is to do business, for himself in truth, but in the name of and as agent for his mother, and then she undertakes to screen the land from liability for acts done in the sphere of the agency, and while repudiating the contract to sell and convey, made on her behalf, to retain the land as her own. This arrangement cannot be allowed to be consummated and rendered successful, to the manifest wrong and injury of others, nor can coverture be used as a protection for a party engaged in it.

A court of equity looks through the disguises which cover the transaction, and deems the legal estate charged with a trust which may be enforced, not by the agent, but by those who in good faith deal with him as possessed of authority to make the contract of sale. It is his property for this purpose, and the defendant cannot be permitted to hold that for which she paid nothing, and at the same time disown the authority of the agent who assumed to act for her, when both are in the compass of the fraudulent agreement previously entered into between the parties. She must surrender the land to him, or abide by his disposition of it. "It must be borne in mind," says the court in *Pilcher v. Smith*, 2 Head. 205, "that the legal disability of coverture or of infancy carries with it no license or privilege to practice fraud or deception on other innocent persons, nor will the disability be permitted to protect them in doing so." So remarks RODMAN, J., delivering the opinion of the court in *Towles v. Fisher*, 77 N. C. 443: "To estop a married woman from alleging a claim to land, there must be some positive act of fraud, or something done upon which a person dealing with her, or in a matter affecting her rights, might reasonably rely, and upon which he did rely and was thereby injured." In *Burns v. McGregor*, 90 N. C. 225, MERRIMON, J., uses this language: "It would contravene the plainest principles of justice, to allow a married woman to get possession of her property under an engagement, not binding upon her, and let her repudiate her contract and keep the property. If she will not, the creditor may pursue and recover it by proper action in her hands;" citing numerous cases. See also 1 Story Eq. Jur., § 385; Kelly Cont. Mar. Women, ch. 6, § 5.

Now the plaintiff becomes the depositary of the title to the land bought by her son and subject to his disposal in her name as agent, under an express agreement between them to prevent its pursuit by his creditors. She now disowns his agency, refuses to be bound by

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his contract made in her name, and yet asserts her right as owner to dispossess one who, as assignee, succeeds to the rights of some at least with whom the obligation to make title was entered into, while the agent, who has received the larger part of the purchase-money in her name, refuses to restore it, and by reason of insolvency, cannot be coerced to do so.

Such a fraud cannot be countenanced, and the plaintiff must fulfill the contract of her agent, or restore the land to the rightful owner that the contract may be carried into effect, or the purchase-money paid restored. She cannot keep his land and he the money received, and the purchasers made to lose all and be without remedy against either. In rendering judgment for the plaintiff in the action, and denying relief in any form from the action to recover possession, there is error and the judgment must be set aside.

The defendant cannot in the present condition of the cause obtain the full measure of redress demanded in his counter-claim for the absence of the vendees, to whose interests he has not succeeded, and who have the same interest with him in the result. His equity is such as to protect him against the present suit, while its enforcement in furnishing affirmative relief requires the presence of other interested parties in the cause.

The cause will therefore be remanded, to the end that application may be made for an amendment admitting new parties, and if this be not done, that judgment may be entered for the defendant, declaring that the plaintiff is not entitled to recover possession of the premises.

Let this be certified.

Error.

Remanded.

KIFF V. WEAVER.

(94 N. C. 374.)

Gift — causa mortis — bond and mortgage.

Bonds and notes secured by mortgage are a proper subject of a gift *causa mortis*, without indorsement, and the mortgage will be carried with or without formal delivery.

ACTION by an administrator to recover bonds, notes and mortgages. The opinion states the case. The defendant had judgment below.

B. B. Winborns, for plaintiff.

David A. Barnes and *J. B. Batchelor*, for defendant.

ASHE, J. A *donatio causa mortis*, in *Nicholas v. Adams*, 2 Whart. 17, is defined by Chief Justice GIBSON, to be "a conditional gift, depending on the contingency of expected death, and that it was defeasible by revocation or delivery from the peril." To constitute a *donatio mortis causa* the circumstances must be such as to show that the donor intended the gift to take effect, if he should die shortly afterward, but that if he should recover, the thing should be restored to him. *Overton v. Sawyer*, 7 Jones, 6.

From this definition it results that to constitute a *donatio mortis causa* there must be three attributes. 1st. The gift must be with the view to the donor's death. 2d. It must be conditioned to take effect only on the death of the donor by his existing disorder; and 3d, there must be a delivery of the subject of donation. 1 Williams Ex. 686.

The donation in this case possessed all the qualities of a *donatio causa mortis*. The donor in his last illness, on the Sunday previous to his death on the Tuesday following, while despairing of all hope of recovery, handed the bonds and mortgages in controversy, in the presence of several witnesses, to the defendant, and told him that "he gave him the same, to take and collect them, and that he might have the money and bonds in case he died," and that the defendant then took the bonds and mortgages, and has had possession of them ever since.

The plaintiff contended in this court that the counter-claim could not be maintained, because the title to bonds, bills of exchange and promissory notes could only be passed by indorsement or assignment, and could not be transferred by mere delivery, so that the delivery of the bonds did not vest the legal title in the defendant, and could not constitute a good *donatio causa mortis*, and that the counter-claim was therefore defective, because it did not state facts sufficient to constitute a cause of action, and in support of his position he relied upon the case of *Overton v. Sawyer*, 7 Jones, 6, where it was held, that bonds or sealed notes, given by delivery as a *donatio causa mortis*, may be recovered at law in an action of trover by the personal representative of the donor, and he also relied upon the cases of *Fairly v. McLenn*, 11 Ired. 158, and

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Brickhouse v. Brickhouse, 11 Ired. 404. The two latter named cases were actions of trover for the conversion of unindorsed promissory notes, the legal title to which could not at that time be transferred except by indorsement, and the actions were at law.

But since that case was decided a change has come over our system of legal procedure. Then an action had to be brought upon an unnegotiable or unindorsed bond, in the name of the assignor, because he was held by the assignment to acquire only an equitable interest, which could not be enforced in a court of law, yet even in that case the court of law so far recognized the interest of the assignee, as to protect it against the acts of the assignor. *Long v. Baker*, 2 Hay. 128, 191, and *Hoke v. Carter*, 12 Ired. 324. But now under the new system, the action on such an instrument must be brought by the real party in interest. Code, § 177.

The construction put upon this section is that the assignee of a bond or note not indorsed is the proper person to maintain the action in his own name, because he is the real party in interest. *Andrews v. McDaniel*, 68 N. C. 385; *Jackson v. Love*, 82 N. C. 404; *Bank v. Bynum*, 84 N. C. 24; and that the possession of an unindorsed negotiable note payable to bearer raises the presumption that the person producing it on the trial is the real and rightful owner. *Jackson v. Love*, *supra*, and *Pate v. Brown*, 85 N. C. 166.

It is immaterial whether the action brought by the plaintiff is legal or equitable, for under the present system the distinction in actions at law and suits in equity, and the forms of all such actions are abolished, and there is but one form of action. Code, § 133.

The complaint or counter-claim, which is in the nature of a cross action, must set forth the cause of action in a plain and concise statement of facts, Code, § 233; *Moore v. Hobbs*, 77 N. C. 65; and then the court will give such relief as is consistent with the case made by the complaint and embraced within the issue. Code, § 425; *Knight v. Houghtaling*, 85 N. C. 17; *Oates v. Kendall*, 67 N. C. 241.

This action then, according to the statement of the facts set forth therein, may be either in the nature of detinue, or a bill in equity for the delivery of the bonds and mortgages, but as the defendant, as assignee by parol, has set up a counter-claim of the alleged *donatio causa mortis* of the bonds and mortgages, it presents the question, whether the transfer of an unindorsed bond,

creating only an equitable title in the donee, is valid as a *donatio causa mortis*.

That the defendant's right of action, by his counter-claim, upon the unindorsed bond, is still an equitable claim notwithstanding Code, § 133, see 1 Estee Pleading, 122. In the case of *Overton v. Sawyer*, cited above, the learned judge, in the conclusion of his opinion, uses the following language: "This conclusion is not at all opposed by the decision of Lord HARDWICK in *Baily v. Snelgrove*, 3 Atk. 214, that a bond for the payment of money may be the subject of a *donatio causa mortis*. This was a case in chancery, and it was held that the equitable interest in the bond passed to the donor, which does not militate at all with the position that the personal representative of the donor could at law recover the value of the bond in an action of trover." This is undoubtedly an authority for the doctrine, that a bond without indorsement is the subject of a *donatio causa mortis* in equity.

And the principle is fully sustained by the authorities. When this principle was first applied to the transfer of personal property, it was limited to chattels, which might be delivered by the hand. But as trade and commerce advanced, it was gradually relaxed, and was extended, first to embrace bank notes, then lottery tickets and securities transferable by delivery, such as notes payable to bearer or to order, and indorsed in blank, and finally to bonds. *Snelgrove v. Bailey*, *supra*, was the first case we believe in which the doctrine was extended to bonds. There the donor had delivered a bond to the donee, saying, "in case I die, it is yours, and then you have something."

The administrator of the donor filed a bill in equity against the donee to have the bond delivered up. Lord HARDWICK, before whom the suit was heard, holding that the bond was the proper subject of a *donatio causa mortis*, dismissed the bill, and the same eminent jurist afterward, in the great case of *Ward v. Turner*, 2 Ves. Sr. 443, said he adhered to that decision, and in reference to this case Chancellor Kent said: "The distinction made by Lord HARDWICK, between bonds and bills of exchange, promissory notes and other choses in action, seems now to be adopted in this country, and they are all considered proper subjects of valid *donatio causa mortis* as well as *inter vivos*." 1 Kent, 379. All evidences of indebtedness which may be regarded as representing the debt, whether with or without indorsement, are the subject of a *donatio mortis causa*. Redfield Wills, Part II, 312, 313, and to

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same effect *Brown v. Brown*, 18 Conn. 410; *Williams Executors*, 692; *Iredell Executors*, 52.

It was at one time matter of considerable discussion in the courts of England, whether a mortgage given to secure the payment of a bond was the subject of a *donatio causa mortis*, and in the case of *Duffield v. Elwes*, 1 Bligh (N. S.) 497, it was decided upon appeal to the House of Lords, from a decision of Vice-Chancellor LEACH, that the delivery of the mortgage, as creating a trust by operation of law, was good as a *donatio causa mortis*. The same principle was admitted in the case of *Hurst v. Beach*, 5 Madd. Ch. 351, and a delivery of a bond and mortgage as a *donatio causa mortis* held to be valid, and the same doctrine was held in *Duffield v. Elwes*, 1 Bligh (N. S.); 3 Pomeroy Eq. Jur., § 1148.

The mortgage need not be assigned. The assignment of the debt, note or bond, secured by the mortgage, even without a formal transfer of the security, carries the mortgage with it. 1 *Estee Plead.*, § 345. These authorities establish beyond all question that the bonds and mortgages in controversy are the proper subject of a *donatio causa mortis*.

But the plaintiff contended there was error in the instructions given by his honor to the jury, that the defendant must prove the gift by a preponderance of evidence, otherwise he would not be entitled to a verdict. He insisted that it being an equitable action, the defendant must establish the gift by clear and unmistakable proof, and cited several authorities to sustain that equitable principle. But admitting the principle, it has no application to a case like this. The possession of the bond and mortgages was *prima facie* evidence of ownership. The law raised the presumption from the fact of possession, and the *onus* was upon the plaintiff to rebut it. *Jackson v. Love*, *supra*, and the cases there cited.

The defendant further excepted to the instruction that the plaintiff, as administrator of James Kiff, was estopped to attack the gift as fraudulent. In this instruction there was error.

The plaintiff, to maintain his position, relied upon the case of *Burton v. Farinholt*, 86 N. C. 260, where it is held, first, that a voluntary transfer of a chose in action by an insolvent donor to his children without valuable consideration is fraudulent and void, and the same may be reached in equity by creditors, and subjected to the payment of their debts, and secondly, that an administrator is estopped by the act of his intestate.

But there is a distinction to be observed between a voluntary assignment of personal property *inter vivos* in fraud of creditors, and a *donatio causa mortis*. The latter does not take effect until after the death of the assignor, and is ambulatory and conditional, and revocable until his death, and is likened to a legacy, and in that respect partakes somewhat of the character of a testamentary disposition of the property, so far as it is liable for the intestate's debts, but it differs materially from a will, in that the donee's title is derived directly from the donor, and the assent of the representative of the donor is not necessary to support his title, yet at the same time the executor or administrator of an alleged donor has corresponding rights, and accordingly, upon a deficiency of assets to pay the lawful claims of creditors, any gift *causa mortis* must give way, so far as may be necessary to discharge lawful demands." Schouler Ex. and Adm., § 219, and the same author, in section 220, lays it down, that "the executor or administrator, representing these and other interests, against the express or implied wishes of the deceased himself, if need be, may procure all assets suitable for discharging demands of this character. But if any balance is left over, it goes, not on the next of kin, but to the donee, for the revocation of any gift for the benefit of creditors of the decedent, is only *pro tanto*." Schouler Ex. and Adm., § 220, and the cases there cited in support of the text. See also Pomeroy Eq. Jur., § 1152; Iredell Executors, 556.

These authorities, except the last, apply the doctrine as well to assignments *inter vivos* as to *donatio mortis causa*. This court however has adopted a different principle as to contracts *inter vivos*, as in the case of *Burton v. Farinholt*, *supra*. But as its application to a *donatio causa mortis* is an open question in this State, we are at liberty to adopt the principles enunciated in Schouler as above, which we do, because it is consistent with justice and equity, and the spirit of our existing system of jurisprudence.

There is no allegation in the complaint that these bonds, etc., were necessary for the payment of debts. Whether that is an objection that might be taken on demurrer, we do not decide. There is no demurrer in the case, and the question of insolvency was one of the elements of the plaintiff's ownership and right to recover, and there was proof that the estate of plaintiff's intestate was insolvent.

Our conclusion is that the plaintiff had the right to recover the

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bonds and mortgages in controversy, and for applying them to the satisfaction of the debts of the intestate, to pay over to the defendant any balance that may remain.

The judgment of the Superior Court is reversed, and this opinion must be certified to the Superior Court of Hertford county, that an account may be taken of the indebtedness of the estate of James Kiff, and the assets that have come, or ought to come into the hands of the plaintiff as his administrator, applicable thereto, to the end that a final judgment may be rendered in the cause in conformity to this opinion.

Error.

Judgment reversed.

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(94 N. C. 282.)

Conflict of laws — usury.

A bond dated in North Carolina, and specifying no place of payment, although delivered in Virginia, is governed by the usury law of North Carolina. (See note, p. 609.)

ACTION on a bond. The opinion states the case. The plaintiff had judgment below.

John A. Moore, for plaintiffs.

A. J. Burton, for defendants.

ASHE, J. The note sued on bears date at Gaston, N. C., and the rate of interest expressed upon its face is eight per cent.

The defendants insist that it is a Virginia contract; that the note was delivered to the plaintiffs at Norfolk, Virginia, and that they are advised and believe that the rate of interest at eight per cent is not allowed by the law of that State.

The defendant, by his demurrer, admits the fact to be true as stated, but contends that even if true, it does not make out a legal defense to the action. This presents for our consideration the question, whether the law of Virginia or of North Carolina governs the contract.

The principles seem to be settled by the current of authorities:

When a contract is made to pay generally, it is governed by the place where the contract is made. 1 Dan. Neg. Inst., § 881; *Arrington v. Gee*, 5 Ired. 590.

But when a contract states the parties had in view another place where the contract was to be performed, the law of that place would govern. *Arrington v. Gee*, *supra*.

In other words if no place is agreed upon for the performance of the contract the *lex loci contractus* prevails, and if the place of performance is stipulated, the *lex loci solutionis* governs. But Judge Story holds, that if a note be made *bona fide* in one place, expressly having an interest legal there, and payable in another place, in which so high a rate of interest is not allowed, it may be sued in the place where payable, and the interest expressed recovered, because the parties had their election to make the interest payable according to the law of either place; or to express the same thing differently, they may lawfully agree upon the largest interest allowed by the law of either place. If this be law, and it must be admitted it is very high authority, then there can be no question that the plaintiffs had the right to recover the amount of the note, with eight per cent interest, but this principle is controverted by authorities equally high, and we do not undertake to reconcile the discrepancies, for we do not consider it necessary to resort to that principle in order to sustain the judgment of the Superior Court. For the principle is concurred in by all the authorities, that when no place is fixed by the contract for its performance, the *lex loci contractus* must govern the contract. In *Arrington v. Gee*, *supra*, Ch. J. RUFFIN, used the following language: "For debts have no *situs* and are payable everywhere, including the *locus contractus*; and therefore the law of that place shall govern, since it does not appear from the contract that the parties contemplated the law of any other place. There cannot be any other rule but that of the place of the origin of the debt, unless it be that where the creditor may be found, since the debtor must find the creditor for the purpose of making payment. But manifestly this last can never be adopted, because it would vary with any change of domicile or residence of the creditor." Then, as was observed by Lord BROUGHAM in *Dow v. Lippman*, 5 Clark & Fin. 1, "a contract payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, as if it was expressed to be there payable. Being payable everywhere, the rule of

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interest must be determined by the law of the origin, since there is nothing else to give a rule."

The doctrine here enunciated is fully sustained by 1 Dan. Neg. Inst., § 881; 2 Pars. Cont. 586, 589; 2 Kent Com. 457; Story Conf. Laws, § 272.

But the defendants insist that their note was under seal, and the contract was not consummated until a delivery, and it is alleged, and admitted by the demurrer, that the note was delivered to the plaintiffs in Norfolk, Virginia. But we think that is altogether immaterial. If the defendant had stated in his answer, that the note was given to secure the payment of goods purchased by the defendants from the plaintiffs, who were merchants of the city of Norfolk, there would have been some force in the contention—for it is laid down in 2 Pars. Cont. 586, "if a merchant in New York comes to Boston to buy goods, and then returns there and gives his note for them, which specifies either Boston, or no place, for payment, it is a Boston transaction." But here there is no allegation that the plaintiffs, at the time of the delivery of the bond, were residents of Norfolk, nor that the note was given in fulfilment of any contract made with them as citizens of that State. For aught that appears from the answer, the plaintiffs may have been residents of this State, or of some other State besides Virginia, and therefore, in the absence of any such allegations in the answer, and the bond on its face purporting to be a North Carolina contract, there is nothing in the answer to prevent the application of the rule of *lex loci contractus*.

Our opinion is, there was no error in the judgment of the Superior Court, and it is therefore affirmed.

Judgment affirmed.

NOTE BY THE REPORTER — The following cases are reported in this series on this point:

Kilgore v. Dempsey, 25 Ohio St. 418; s. c., 18 Am. Rep. 306.—Where the borrower resided in Ohio, the laws of which State, at the time, allowed parties to contract for any rate of interest not exceeding ten per cent, and the lender resided in Pennsylvania, where six per cent was the legal rate of interest, on a loan of money made in Ohio, the parties had a right to stipulate in the note for interest at ten per cent per annum, payable semi-annually, and make the note payable in Pennsylvania, without rendering the contract usurious.

Bowman v. Miller, 25 Gratt. 331; s. c., 18 Am. Rep. 686.—B., a resident of Virginia, took a promissory note made by himself, and indorsed by other residents of Virginia, blank as to date and place of payment, to Maryland, where

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he inserted a date and place of payment in Maryland, and negotiated it at a rate of interest usurious under the laws of both States. This note was renewed by one made by the same parties, which was also usuriously discounted in Maryland. A renewal note for the amount due made and indorsed and payable in Virginia by the same parties, was given for the second note. By the laws of Maryland usury only avoids a contract as to the excess of interest agreed; by those of Virginia it invalidates it. *Held*, in an action on the last note, (1) that the original contract was a Maryland one and could be enforced there; (2) that the note in suit was but a continuation of the old debt, made with reference to the laws of Maryland, and not being void there, could not be avoided in Virginia.

Lindsay v. Hill, 66 Me. 212; s. c., 22 Am. Rep. 564.—A promissory note bearing lawful interest was made in New Brunswick and secured by mortgage on lands in Maine. After the note was due illegal interest was exacted for forbearance of payment. By the law of New Brunswick usurious contracts were void, and the lender forfeited both principal and interest, but in Maine the rate of interest was not limited. In an action to foreclose the mortgage, *held*, that the mortgage was valid, and that the statute imposing a forfeiture of the principal and interest was in the nature of a penalty and of no effect outside of New Brunswick, and that the extra interest paid was not a set-off.

Overton v. Bolton, 9 Heisk. 762; s. c., 24 Am. Rep. 367.—A., residing in Mississippi, sold cotton to B., a resident of Tennessee, and received therefor the note of B under seal, dated in Mississippi, but payable in Tennessee to the order of D., a resident of Mississippi, who indorsed it. It was a condition of the sale that the note should be indorsed by the defendant, a resident of Tennessee. The defendant, with knowledge of the facts, indorsed the note in Tennessee, and it was there delivered to A., and by him sold to the plaintiff, who was ignorant of the facts. The defendant was the last indorser. The note bore a rate of interest lawful in Mississippi but not in Tennessee. *Held*, that the note, so far as related to defendant, was governed by the laws of Mississippi and was valid; there was an implied warranty on defendant's part that the note was a valid contract, and executed in a State where the interest demanded was lawful.

Freise v. Brownell, 35 N. J. L. 285; s. c., 10 Am. Rep. 239.—A bill drawn in Illinois, and delivered to the drawee in New York, is governed by the law of the latter place, but if in good faith made payable in the former State, any rate of interest, not exceeding that there allowed, may be reserved.

Stickney v. Jordan, 58 Me. 106; s. c., 4 Am. Rep. 251.—A promissory note made in New Hampshire, payable with interest annually to a payee resident in that State, is to be construed according to the law of that State, and compound interest is recoverable by an indorser in an action in Maine, that being the law of interest in New Hampshire in such cases.

Merchants' Bank of Canada v. Griswold, 72 N. Y. 472; s. c., 28 Am. Rep. 159.—The defendant, by a power of attorney, authorized L. "as my agent to make draft on me from time to time, as may be necessary for the purchase of lumber on my account, and to consign the same to the care of S. & Co." L. drew drafts in his own name, which the plaintiff discounted upon the faith

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and possession of the power of attorney. The drafts were drawn and discounted in Canada, but specified no place of payment. In an action upon one of the drafts, *held*, that the contract was to be governed by the law of Canada, and as usury is not a defense there, the plea of usury was not maintainable.

Wayne County Savings Bank v. Low, 81 N. Y. 566; s. c., 37 Am. Rep. 533.—The plaintiff, a Pennsylvania banking corporation, agreed in that State with defendant, a citizen of New York, for the renewal of a note, made by the latter and held by the former. The renewal note was made, dated and payable in New York, and was mailed by the defendant to the plaintiff, with a check for the discount. The discount was at a rate lawful in Pennsylvania, but unlawful in New York. *Held*, that the note was not usurious in New York.

Thornton v. Dean, 19 S. C. 583; s. c., 45 Am. Rep. 796.—A note made in South Carolina, payable in North Carolina, secured by a mortgage of lands in South Carolina, upon interest lawful in South Carolina, but usurious in North Carolina, is enforceable in South Carolina.

Scott v. Perlee, 39 Ohio St. 63; s. c., 48 Am. Rep. 421.—A note made in Ohio by a citizen of Illinois, specifying no place of payment, but for money to be used in Illinois, at a rate of interest lawful in Illinois, but unlawful in Ohio, is valid in Ohio.

We add the following references:

In *Derringer's Adm. v. Derringer's Adm.*, Superior Court of Delaware, 1881, but as yet unreported, one of the causes of action was a promissory note, which stipulated for interest at the rate of twelve per cent per annum. The note was made in Pennsylvania, where the payee resided; and as no other place was specified, Pennsylvania was conceded to be the place of payment. The contract therefore was a Pennsylvania contract. It was made there, and that was the place of performance. The legal rate of interest in Pennsylvania at the time of the making of the note was six per cent, the same as in Delaware. In Pennsylvania usury did not avoid a note on which it was charged. The principal, together with legal interest, could be collected, the note being void only as to the usurious excess. In Delaware usurious contracts were, and are now unenforceable. The court held that the note in question could not be collected in Delaware. It was, the court declared, unquestionably usurious, bearing interest at a rate forbidden both by the laws of Pennsylvania and those of Delaware. It had been shown that according to the laws of Pennsylvania, with reference to which the note was made, the principal of a usurious note could be collected, together with legal interest; and it was sought on the ground of comity to enforce that law in the Delaware courts. But, the court continued, comity did not go to that extent. Whilst every State should show due regard for the laws of other States, it could not concede so much to them as to permit the enforcement of contracts which were immoral or against its public policy. The courts of Delaware had declared again and again that contracts infected with the taint of usury were void and could not be enforced, and in the case under consideration the court could not extend the rules of comity so as to permit such an enforcement. In support of this view the court cited 2 Kent Com. 458; and Story Conf. Laws, § 244, etc., in both of which it

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is laid down that no State is bound to enforce a contract which is immoral or against its public policy. The note was accordingly thrown out of the case.

This ruling seems inconsistent with that in *Bailey v. Seal*, 1 Harr. 287, 287, where seven per cent was allowed on a New York contract, that being the legal rate there. And in the case of *Parks v. Evans*, 5 Houst. 576, ten per cent was allowed on a Missouri note, under similar circumstances.

In *Akers v. Demond*, 103 Mass. 323, it was held: "The general principle is that the law of the place of performance is the law of the contract. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the State where the contract was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offense against the laws of Massachusetts. But when a usurious or other illegal consideration is declared by the law of any State to be incapable of sustaining any valid contracts, and all contracts arising therefrom are declared void, such contracts are not only void in that State, but void in every State and everywhere. They never acquire a legal existence."

In *Jewell v. Wright*, 80 N. Y. 239, there was a contract made in Connecticut, and to be performed in New York, which stipulated for interest at a higher rate than was allowed by the law of either State. The principal question discussed by the court was what law governed the construction of the contract, and the conclusion having been reached that the validity of the contract must be determined by the law of the place of performance, the note was held void, that being the penalty of usury in New York. This case was referred to and discussed in *Dickinson v. Edwards*, 77 N. Y. 578; and in the opinion of the court in the latter case, delivered by Judge FOLGER, we find the following comments: "One criticism upon it (*Jewell v. Wright*) is, that as the note there was obnoxious to the usury laws of Connecticut, as well as of New York, there was no need of the reasoning of the opinion, resting the judgment upon the rule that the law of the place of performance must govern; and that hence the opinion rendered was *obiter*. This criticism is not well founded. The usury law of Connecticut is not as fatal as that of this State. By the law of that State the contract is not utterly void, but void only as to the whole interest reserved or taken. *Fisher v. Bidwell*, 27 Conn. 363. So that though the opinion of *Jewell v. Wright* starts with saying that the note was negotiated at a rate of interest illegal, both in Connecticut and New York, it is correct in further stating the main question in the case to be, whether the laws of the former or the latter State are to control as to the defense of usury. In the one case the plaintiff would lose only a sum equal to the amount of interest taken or reserved. In the other he would lose the whole amount of the note."

It has been held in Michigan that where a usurious contract is made and to be performed in another State, but the laws of that State do not avoid it on that ground, as the law of Michigan does usurious contracts to be performed there, the contract may be enforced by the Michigan courts. *Iron Co. v. Burkam*, 10 Mich. 283.

A promissory note was made and dated in Nebraska, but payable in New York. It bore interest at ten per cent. Held, that whether usurious must be

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determined by the laws of Nebraska and not of New York. *Joslin v. Miller*, 14 Neb. 91.

Where a citizen of New York lent money to a citizen of Nebraska, secured by mortgage on land in Nebraska, the money being furnished in New York and the mortgage executed in Nebraska, *held*, that the contract reserving ten per cent, the legal rate in Nebraska, was not usurious, although the legal rate in New York was only six per cent. *Kellogg v. Miller*, 18 Fed. Rep. 198.

A promissory note made and payable in New York, but delivered and discounted in Massachusetts, is subject to the usury law of the latter State. *Hiatt v. Griswold*, 5 Fed. Rep. 578.

A promissory note was signed in New York, payable there, and transmitted by the maker to Rhode Island for discount, and had no inception until discounted there. *Held*, a Rhode Island contract as to usury. Citing *Tilden v. Blair*, 21 Wall. 241; *Andrews v. Pond*, 13 Pet. 65, *Cockle v. Flack*, 3 Otto, 344.

The acceptance of a draft dated in one State and drawn by a resident of that State on a resident of another, and by the latter accepted without funds and purely for accommodation, and returned to the drawee to be negotiated in the State of his residence, and the proceeds to be used in his business there, he to provide for its payment, is, after negotiation and transfer to a *bona fide* holder, to be regarded as a contract of the State where drawn, although the terms of the acceptance rendered it payable in the State where the acceptor resides. *Tilden v. Blair*, 21 Wall. 241.

In *Sheldon v. Haxtun*, 91 N. Y. 124, defendant, who resided in Illinois, having collected certain moneys belonging to S., a resident of this State, by an agreement with the latter sent to him by mail, in place of the money, his (defendant's) notes for the amounts, dated at his place of residence in Illinois, payable with ten per cent interest, which rate of interest was lawful in that State. In an action upon the notes wherein the defense of usury was pleaded, *held*, that their validity was to be determined by the law of Illinois, and as they were valid there they were valid here; and this although one of the notes was made payable in this State.

Defendant was formerly a resident of this State. When here he borrowed of S. \$1,500, giving his note therefor, executed here but dated at a place in Illinois, payable with ten per cent interest. After the defendant had become a resident of Illinois S. sent the note, which was then past due, to him by mail, requesting a new note for the balance of principal unpaid, this defendant sent by mail, the new note being dated in Illinois, payable one year from date, with ten per cent interest. *Held* (ANDREWS, C. J., and MILLER, J., dissenting), that although the original note was usurious and void, yet in the absence of any evidence of an intent to evade the usury laws of this State, the new note was to be regarded as an Illinois contract: that the surrender of the old note was a good consideration therefor; and that it was valid. *Id.*

In respect to the first point, ANDREWS, C. J., said: "The transaction was in substance a loan by the plaintiff's intestate, a resident of New York, to the defendant, a resident of Illinois, in the latter State, of funds there held by and belonging to the former, at a rate of interest lawful in Illinois. If the plaintiff's intestate had gone in person to Illinois, and collected the notes, and

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then lent the money to the defendant at ten per cent interest, there could; we apprehend, be no question as to the lawfulness of the transaction, although the notes were payable in this State. *Pratt v. Adams*, 7 Paige, 616; *RAPALLO, J.*, in *Wayne Co. B'k v. Low*, 81 N. Y. 573; s. c., 27 Am. Rep. 538. Nor could it, we conceive, alter the case if the negotiation for the loan was made in this State, and afterward consummated and the transaction completed in Illinois, the transaction being *bona fide*, and there being no intent thereby to evade the laws of this State. The dealing, for the purpose of determining the question of usury, would be assigned to the place where the funds were and where the loan was consummated. What occurred between the parties was equivalent to the plaintiff's intestate going to Illinois and there making the several loans to the defendant. The funds were there in possession of the defendant as agent. He was permitted to retain them, and became a debtor for the amount. Upon depositing the notes in the mail the transaction was complete. The money became the defendant's, and the notes the property of the intestate. The defendant became the borrower of the proceeds of the notes collected by him. The fact that one of the notes was expressly payable in this State does not distinguish it in the point of usury from the others. This was an incidental circumstance and does not overthrow the other decisive circumstances which make Illinois the place of contract. *Tilden v. Blair*, 21 Wall. 241; *Wayne Co. B'k v. Low, supra*."

In *Western Transp. Co. v. Kilderhouse*, 87 N. Y. 432, I. was indebted to plaintiff, a Michigan corporation, upon a note for \$7,000, and with other debts secured by a mortgage on a propeller. Before the note became due it and the mortgage were transferred to a Detroit bank and at maturity were owned by such bank. After maturity I. went from Buffalo to Detroit and made an application for an extension of time. The bank informed him that its rate for loans was ten per cent per annum; that if I. would give new notes for the amount due, indorsed to the satisfaction of the bank, to be held by such bank as further and additional security, and pay ten per cent per annum, the bank would upon these terms extend the time of payment so that the amount could be paid in installments, not exceeding for any part a longer period than three months. He assented to these terms, and promised the bank to procure the notes, and stated to the bank that he would return to Buffalo to get the indorsements of the new notes to be given. The bank afterward sent its agent with the \$7,000 note and the mortgage to Buffalo. The agent there saw I. and informed him that he had directions to foreclose the mortgage unless the note was paid or the arrangement I. had made at Detroit for an extension of payment was carried out. I. on the same day procured notes bearing seven per cent interest, for the full amount of the past-due note and interest, and paid the agent the difference between the rate of interest the notes bore and that asked by the bank, to the time the notes should become due. These notes were made and indorsed in Buffalo. In an action against defendant, who was an accommodation indorser on two of the notes, *held*, that the defense of usury under the laws of New York was not available. The contract for the extension of time was made in Michigan and was governed by the laws of that State and not by the laws of this State. It is well settled, that penal laws

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have no extra-territorial force. *Charles v. People*, 1 N. Y. 180; *Ormes v. Dauchy*, 83 N. Y. 448; s. c., 87 Am. Rep. 588, and the statute of New York regulating the rate of interest is merely a penal law. The usurious contract must be set up, the answer specifying its terms and the particular facts relied on to bring the case within the prohibition of the statute. *Manning v. Tyler*, 21 N. Y. 567; *Dagal v. Simmons*, 28 N. Y. 491, and must be proved substantially as alleged. In this case the minds of the parties met in Michigan. That State therefore was the place of the contract, and so far as the bank was concerned, the place of performance. The agent sent to Buffalo had no authority except to accept the fruits of the contract, not to vary it or to make a contract by which the validity of the notes should be determined. The case is brought directly within the rule which makes the validity of a contract depend upon the law of the place in which it is made and when broken furnishes a cause of action to be enforced in any State, although the contract if made when the remedy is sought might, by the law of the former, be invalid. See *Milliken v. Pratt*, 125 Mass. 374; s. c., 38 Am. Rep. 241; *Wayne Co. Bank v. Low*, 81 N. Y. 566; s. c., 27 Am. Rep. 538.

In *Connor v. Donnell*, 55 Tex. 167, the court said: "An accommodation note, wherever dated, signed or indorsed, takes effect, and in law is regarded as made, when and where it is actually delivered and negotiated. 1 Dan. Neg. Inst., §§ 192, 888; *Fant v. Miller*, 17 Gratt. 47. Although under this rule a note be actually or in law made and indorsed by citizens of Texas in New York, and be there discounted by a citizen of New York at a rate lawful in Texas but usurious in New York, if by the date and tenor of the note it appears that the parties intended to make it payable in Texas, and contracted with reference to the laws of Texas, the courts of this State follow the authorities which hold such a note valid. *Bullard v. Thompson*, 35 Tex. 318; *Depau v. Humphreys*, 8 Martin (N. S.), 1; *Chapman v. Robertson*, 6 Paige, 637. But if the note sued on be in law made in New York, and be also expressly made payable at a point in that State, then the question of usury will be controlled by the law of New York. It is believed that no authority can be adduced to the contrary. See *Dickinson v. Edwards*, 77 N. Y. 173. Testing appellants' third plea or answer by these rules, it is found to present a valid defense. It shows that the note sued on was made for the accommodation of the bank, and although signed, dated and indorsed in Texas, was first negotiated and delivered in New York, and in law was made there. The note being also payable in New York, and having been discounted there for the bank at a rate of interest forbidden by the law of that State, the defense of usury, as stated by the plea, was complete."

In *Pancoast v. Travelers' Ins. Co.*, 79 Ind. 172, the court said. "The last point made upon the assignment of errors is, that the notes and mortgage were made payable in the State of Connecticut; the law of that State should control the interest and not the law of this State, and that the notes were usurious."

"It is true that the notes and mortgage are made payable at Hartford, in the State of Connecticut. But it is true that they were executed in this State, the mortgagor lives in this State, the lands lie in this State. And from the terms of the mortgage it is clear that the intention of the parties was that the con-

tract was to be enforced in this State. The mortgage could be enforced nowhere else. In such a case the law of this State governs, the rate of interest being fixed in accordance with the laws of this State. Where the parties reside in different States they may contract at a rate of interest allowed by either State, provided it be done in good faith, without an attempt to evade the usury law. *Townsend v. Riley*, 46 N. H. 300; *Peck v. Mayo*, 14 Vt. 33.

"In the case of *Fisher v. Otis*, 3 Chand. 83, it was held that 'A security made in one State where the interest by law is twelve per cent, but payable in another State where interest is restricted to six per cent, is good, where a recovery is sought in the State where it was given. The *lex loci contractus* controls the construction and validity of the contract. A contract valid where it is made, is valid everywhere, except it is shown that the contracting parties intended to be governed by the laws of the country where performance was to be made.' This case was adhered to in *Fisher v. Otis*, 3 Pinn. (Wis.) 78, and the same principle was held to in *Newman v. Kershaw*, 10 Wis. 333-340.

"In the case of *Chapman v. Robertson*, 6 Paige, 627, the chancellor uses the following language: 'But if a contract for the loan of money is made here, and upon a mortgage of lands in this State which would be valid if the money was payable to the creditor here, it can not be a violation of the English usury laws, although the money is made payable to the creditor in that country and at a rate of interest which is greater than is allowed by the laws of England. This question was fully and ably examined by Judge MARTIN in the case of *Depeau v. Humphreys*, in the Supreme Court of Louisiana (20 Mart. 1); and that court came to the conclusion, in which decision I fully concur, that in a note given at New Orleans, upon a loan of money made there, the creditor might stipulate for the highest legal rate of conventional interest allowed by the laws of Louisiana, although the rate of interest thus agreed to be paid was higher than that which could be taken upon a loan, by the laws of the State where such note was made payable.'

"This case, we think, states the law correctly. There have been a number of cases decided by this court, in which it has been held that where no rate of interest has been fixed, the law of the place where payable will govern. See *Gray v. State*, 72 Ind. 567, and cases cited."

In *Sharp v. Davis*, 7 Baxt. 607, D., a citizen of Mississippi, had money on deposit with a firm in Tennessee, who paid him ten per cent for its use; afterward, H., a citizen of this State, borrowed the money of D., giving his note, due twelve months after date, payable to D., at his home in Mississippi, with ten per cent per annum after maturity. After this a note in renewal was executed in like form, due ten years after date, with ten per cent interest from date. It is charged that the note was made payable in Mississippi, where ten per cent is legal, to evade the usury laws of Tennessee. *Held*, that the note being payable on its face in Mississippi, and the law of that State authorizing ten per cent, it was not usurious on its face, and that the facts in the case constitute a Mississippi contract, and enforceable in accordance with the laws of that State by the courts of Tennessee.

In *Bowles v. Eddy*, 33 Ark. 645, the court said: "It appears that appellees resided in New York; Campbell and Bowles in Chicot county, Arkansas, where

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the lands are situated, and that the note and deed of trust were made in Memphis, Tennessee, where Trezevant, the trustee, resided. The note upon its face bears no interest; but appellant attempted to prove that it was executed for moneys advanced by appellees to Campbell and Bowles to aid them in cultivating cotton, upon contracts that the moneys were to be repaid with interest, and that appellees were also to have a certain portion of the cotton produced."

"Usury, as at present understood, is unknown to the common law, and depends wholly upon statutory enactment. Tyler on Usury, p. 64. "In some cases importance seems to be attached to the circumstance that one or both of the parties were inhabitants of the State or country where the contract was made. But there is probably no force in the distinction attempted to be made. The rule upon the subject is, that the law of the place where the contract is made is to control it, unless it appears upon the face of the contract that it was to be performed at some other place, or was made with reference to the laws of some other place; and the reason of the rule is, not the allegiance due from the contracting parties to the government where the contract is made, or is to be executed, but the supposed reference which every contract has to the laws of the State or country where it was made, or to be executed, whether the parties are citizens of that State or country or not. But the *lex loci* applies only to the validity or interpretation of contracts, and not to the time, mode or extent of the remedy. And yet the rule is well settled, that when a contract is made with reference to another country in which it is to be executed, it must be governed by the laws of the place where it is to have its effect. But the *lex loci* is to govern, unless the parties had in view a different place, by the terms of the contract. To repeat then: the general rule established, *ex comitate et jure gentium*, is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be considered according to the laws of the place where the contract is to be executed. *Lee v. Selleck*, 83 N. Y. 615. This is the doctrine of the authorities as well as the elementary writers; and it would seem as a general proposition, that from the rule there would be no difficulty in ordinary cases of alleged usury to determine the status under which they are to be decided.' *Jones v. McLean*, 18 Ark. 462.

"The note complained of as usurious having been executed at Memphis, Tennessee, and upon its face designating no other place of payment, its validity must be determined by the usury statutes of the State of Tennessee."

In *Backhouse's Ex. v. Selden*, 29 Gratt. 581, the court said: "And the court being further of opinion, that the evidence * * * that the principal obligor in the bond resided at Victoria, Texas; that the bond is dated there; that the drafts, which are the consideration of the bond, were received there, and that the money borrowed was used there in paying for land which he and his brother had purchased there, justified the court in the inference that the contract was made at Victoria, Texas (*Wilson v. Lazier*, 11 Gratt. 481), and was to be performed there, and was consequently controlled and governed by the laws of Texas, which allowed a rate of interest, by contract of parties, not exceeding twelve per centum per annum. *Arrington v. Gee*, 5 Gratt. 593.

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"Undoubtedly the bond was executed by Thomas L. Taylor, the principal debtor, at Victoria, Texas, and it is obligatory on him to pay the stipulated interest, which did not exceed the rate of interest allowed by the law of Texas. The other obligors resided in Virginia. It is conceded that they executed the bond as sureties of Thomas L. Taylor, and it is impossible to suppose that they could have contemplated the payment being made here by them, and not at Victoria, Texas, by the principal. In the nature of things they expected only to be secondarily liable, and they are liable for what the principal had bound himself." *Id.*

The principle of all the decisions is this: the validity of a contract is to be decided by the law of the State where it was made, unless by its terms it is to be performed in another State, in which case the law of the State in which it is to be performed is to govern. Story Conf. Laws, § 280. "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury." TANEY, C. J., in *Andrews v. Pond*, 18 Pet. 65.

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(94 N. C. 457.)

Highway — by prescription.

A town street may become a public highway by twenty years' public use, but such use must be adverse, as of right, and accompanied by some action of the public authorities.

MOTION to continue injunction. The opinion states the case. The motion was granted below.

Waddell and Elliott, for plaintiff.

P. D. Walker, for defendant.

MERRIMON, J. A roadway or street in a town may become a public highway by the continued use of it by the public for twenty years, not simply by permission, tacit or express, of the owners of the land over which it passes, but adversely to them, and as of right. That is, the proper public authorities must have exercised authority and control over it in some way to be seen, as by superintending and keeping it in proper repair, adversely to the owners

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of the land. The presumption of right in favor of the public will not arise, unless the proper public authorities, as authorized by law, shall do something that puts the owner of the land on notice that his right is denied, and to assert the same by action, if he shall desire or see fit to do so. It would be unjust, as well as ungracious, to take advantage of his generous permission to use his land for public convenience, and the law will not allow this to be done.

When however the public assumes and exercises authority and control over the road, and the owner of the land makes no opposition, and twenty years elapse, conclusive presumption arises against him in that respect. Hence, in *State v. Purify*, 86 N. C. 681, the court says: "A public highway is one established by public authority, and kept in order by the public, under the direction of the law; or else it is one used generally by the public for twenty years and over which the public authorities have exercised control, for the reparation of which they are responsible."

In *Kennedy v. Williams*, 87 N. C. 6, RUFFIN, J., said: "According to the current of decisions in this court, there can be in this State no public highway, unless it be one either established by the public authorities, in a proceeding regularly constituted before a proper tribunal or one generally used by the public, and over which the proper authorities have exerted control for the period of twenty years; or one dedicated to the public, by the owner of the soil, with the sanction of the authorities, and for the maintenance of which they are responsible." It may be added, that other highways may be established by legislative enactment. All the decisions of this court are to the same effect. *State v. McDaniel*, 8 Jones, 284; *Boyden v. Achenbach*, 79 N. C. 540. Now applying what has been said to the present case it seems to us that the plaintiff has failed to show that she is entitled to the provisional relief she demands. It is not contended that the street or way in question was established under any town or county authority, as allowed by statute. It is not alleged in the complaint, nor does it appear from the affidavits produced in support of the motion for an injunction, that the public used it adversely to the owners of the land over which it passes, as of right. Indeed, so far as appears, while it had been used generally, as a convenient pass-way, no public authority, county or town, had ever exercised any supervision or control over it at all. The use of it, which had been for a great many years—forty or fifty—was simply permissive on the part of the owners of

the land. No public authority ever assumed supervision or control over it or kept it in repair. It was an open way, immediately along the river front or beach, that everybody who chose to do so passed over at will, but not as of right.

The mere fact that the defendant knew that the people generally passed over the way, and that he occasionally passed over it himself, cannot, as seems to be intended, be created as a dedication of his land to the purpose of a highway. *Boyden v. Achenbach, supra*; *State v. Jones, supra*.

A dedication of land to the purpose of a highway must appear by some act of the owner of it, that indicates expressly, or by plain implication, a purpose to create a right in the public to use it adversely to him, and as of right. He must do some act that indicates his concession and yield the use of the land for such purpose, and the proper public authority must in some way take control over it, thus manifesting a recognition and acceptance of the owner's dedicatory concession. The mere use of a way over land does not constitute it a highway, nor does a mere permissive use of it imply a dedicatory right in the public to so use it. The use must be adverse to the owner, and as of right, manifested in some appropriate way by the properly constituted public authority.

It appears from the plaintiff's complaint, and as well as from the affidavits produced by her, that the way in question was not a highway, and her supposed right therefore has no existence. She alleges no cause of action and therefore the injunction was improvidently granted.

It would seem that the way ought to be a highway, but whether it ought or not, is not a question for our decision—it is our province to simply declare and apply the law. If the proper authorities of the town deem it necessary to make it so, they can easily do so.

The order granting the injunction must be reversed, and to that end, let this opinion be certified to the Superior Court of the county of Brunswick. It is so ordered.

Judgment reversed.

Kirk v. Atlanta and Charlotte Air-Line Railroad Co.

KIRK v. ATLANTA AND CHARLOTTE AIR-LINE RAILROAD CO.

(94 N. C. 625.)

Master and servants — fellow-servants — railroad yard-master and car repairer.

A railroad yard-master and a car repairer are fellow-servants.*

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

W. P. Bynum, for plaintiff.

R. D. Johnson, D. Schenck and F. H. Busbee, H. C. Jones and C. M. Busbee, for defendant.

SMITH, J. The complaint imputes negligence to the defendant company, in the management of a shifting engine, in charge of an engineer, whereby it came in contact with a stationary car, and the impulse of which put others in motion, under which the plaintiff, then engaged in inspecting, by direction of the foreman of the round house, was run over, and his arm crushed, so as to require amputation; and for this injury, demands compensatory damage. The answer denies the imputation of negligence and avers contributory negligence on the part of the plaintiff, in producing the result. It also sets up the further defense, that if there was a want of due care in moving the engine, it was the act of a fellow-servant, in the same general employment, for the consequences of which the company, the common principal of both, is not responsible.

The issues prepared and submitted to the jury were:

“(1). Whether the plaintiff’s injury was caused by the defendant’s negligence.

“(2). Was the plaintiff’s negligence contributory thereto; what damages is he entitled to?”

The court refused an issue tendered for the defendant. “Was the injury caused by the negligence of a servant of the company—if so, what one?” and the defendant excepted thereto.

The testimony offered tended to show the following facts:

The plaintiff’s general employment was that of carpenter, and he had been often sent out, as he was on the occasion when he was

* See 58 Am. Rep. 85, 616.

hurt, to inspect cars, and report upon their condition and fitness for immediate use. To this service he made no exception that it was not within the scope of his employment. The yard-master, B. T. Thompson, at the junction, had the general management, making up, switching, receiving and delivering trains. He had ordered Harris, the engineer in charge of the switch engine, to stop at the eating house, seven car lengths from the cars under inspection. It was the custom for the switch engine to remain, and not move until the inspection was finished, and the engineer informed of the fact. One Todd was the regular inspector, acting at the time, the plaintiff assisting in place of one Clark, who was sick. It was the duty of Todd to notify the yard-master when the examination was over, and then for him to communicate the fact to the engineer, that he might proceed. One John Smith, a colored man, was an assistant of the yard-master, and when directed would convey messages and give signals to the engineer when the yard-master was present, that the way was clear and he could proceed. On this occasion Smith gave the unauthorized and premature order, as it is termed, to the engineer Harris, who thereupon put his engine in motion, and caused the car under which the plaintiff was inspecting to crush his arm, no notice having been given him of what was about to be done, and he not seeing or hearing of the approach of the engine, until the impact took place.

The blame then rests upon Smith primarily for giving the order, and it is perhaps shared by Harris, in heeding and acting upon it, as coming from that source, and A. P. Brown, the fireman.

It was admitted by the counsel for plaintiff, that Harris, the engineer, Brown, the fireman, Thompson, the yard-master, and Smith, his assistant, were fellow-servants of the plaintiff, and the court directed the jury, that "if the injury resulted to the plaintiff, without fault on his own part, from the negligence of an employee or fellow-servant, occupying the same level with the plaintiff Kirk, when the Air-Line Company used due care in the selection of such fellow-servants, then the jury could not say from this that the injury resulted from the carelessness or negligence of the Air-Line Company."

Then after defining a fellow-servant, as "one upon an equality with the injured person, under the same or common control, engaged in a common employment, or in the same line of employment," the charge proceeds to subjoin a qualification of the general

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rule of non-liability of the common master in these words: "But if one of the employees has the right to give orders, and the other by his employment is bound to obey the orders, then the person who has the right to give an order which the other ought to obey, under the contract of employment which he has taken upon himself, these are not fellow-servants, but the man who has the right to give the orders is a middle man, and whether vice-principal or not, if Kirk was injured by the carelessness or negligence of one occupying this position, which gave him the right to order, and which order Kirk, by the nature of his employment, ought to obey (if he has shown his right to recover in other particulars), and he is without fault on his own part, he is entitled to your verdict for such damages as you think he has shown, and to which he is entitled."

The first observation suggested by the charge is the omission of the court to tell the jury, between which of the parties and the plaintiff subsisted the relations of middle-man and subordinate, which exempt the defendant from the protection of the general rule, and subject it to direct accountability for the injury sustained. Between the plaintiff, and those to whose immediate precedent action the injury is attributed, the relations are conceded to be those of fellow-servants, and in one view properly so conceded, and the charge, if it has any support in the evidence, must have reference to the yard-master, under whose general superintendence all the movements and operations at the station are placed. But it was not from any inattention or act of his that the mischief proceeded. He gave no false information, nor did he issue any improvident order on the occasion, so far as the testimony reveals his conduct, but the culpability abides upon Smith or Harris, or upon both, and these are co-employees for whose conduct in the discharge of duty their common superior is not answerable.

But is the charge correct in stating the proposition of law, and is it appropriate to any aspect of the testimony? Is it true that when among fellow-workmen, one has authority to direct and control the work of others, as in all cases a general superintendence must be vested in some one, in order that the efforts of each may be in harmony, and tend to one practical result, where many are employed, this person becomes a middle-man representing as an agent their common principal, and imposing on him a personal responsibility for the agent's individual misconduct, or want of

proper care and caution, in conducting the business? If this were so the subordination necessary among numerous workmen engaged in the same general business would practically neutralize the rule itself, for control and direction must rest in some of them, or confusion and conflict would ensue. It is not always easy to determine the dividing line to be crossed, which takes an employee out of his class, and changes him into a middle-man, who represents the superior, and bears his relation to the other employees, so that his negligence becomes, in legal effect, the negligence of the superior toward the latter.

The true principle is thus stated by ASHE, J., delivering the opinion in *Dobbin v. Railroad*, 81 N. C. 446; s. c., 31 Am. Rep. 512: "To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and in case of dereliction report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor, purchase material, etc. He must be an agent, clothed in this respect with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience. Such an agent is what is known as a 'middle-man,' who as well as the laborer is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a fellow-servant in the sense of that term as used by the courts, because he represents the master in his authority to direct, control and manage the business."

This descriptive language is used by a recent author in defining this intermediate employee who assumes and exercises the functions of the employer: "When however the employer leaves every thing in the hands of a middle-man, reserving to himself no discretion, then the middle-man's negligence is the employer's negligence, for which the latter is liable." Whart. Neg., § 229.

Appended to the section is a note numbered 3, in which the recognized rule in England and generally prevailing in this country is declared to be, "that the term fellow-servant includes all who serve the same master, work under the same control, derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it."

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The operation of the principle is not altered by the fact that the servant chargeable with negligence is a servant of superior authority, whose lawful directions the other is bound to obey. In *Fellham v. England*, L. R., 2 Q. B. 33, decided in 1866, the defendant was a maker of locomotive engines, and had many hands in his employment, among whom was the plaintiff. In the course of the work a travelling crane was used to hoist the engines and convey them to tenders for their carriage. The crane moved on a tram-way, resting on beams of timber, and supported by piers of brick work, which had been recently repaired and partly rebuilt, and the brick work was fresh. In using the work the piers gave way, and then the beams broke from the strain cast upon them. The accident occurred at the first using of the crane. There was no evidence of any defect in the crane, or negligence in the manner of using it, or that the engine was unreasonably heavy; nor was there of the defendant's personal privity or interference, but his manager or foreman was present and directed the hoisting. The traveller was worked by three men at one end and three at the other. When moving along the crane oscillated, and the foreman thinking it not worked properly, directed the men to stop, as they did for a brief moment, and then to move on again, and just before he had ordered the plaintiff to get on the engine and clean it. He did so while it was in motion, and while thus occupied some mortar fell, the pier gave way, and the engine fell, breaking the plaintiff's arm. The court said: "We think the foreman or manager was not in the sense contended for the representative of the master. The master still retained control of the establishment, and there was nothing to show that the manager or foreman was other than a fellow-servant of the plaintiff, although he was a servant having greater authority," quoting with approval what was said by WILLES, J., in *Gallagher v. Peper*, 33 L. J. C. P. 335, "A foreman is a servant as much as the other servants whose work he superintends."

In *Chicago, etc., R. Co. v. Murphy*, 53 Ill. 336; s. c., 5 Am. Rep. 48, the facts were not unlike those in the case before us. The person, for causing whose death the company was sought to be held responsible in that case, was one of several workmen in its service, under the immediate charge of a foreman, whose duty consisted in examining trains on their arrival at the station, and making needed repairs. He and a fellow-workman had been engaged in "jacking up" and repairing a car in a freight train, and having finished had started for the

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shop in which their tools were kept, when in passing down the rails of the main track he was struck by a switch engine with such violence as to cause his death soon afterward. The engine was used on the station grounds, and although under the immediate control of the yard master, was used as well for other purposes as for switching cars to be repaired. When a car needed repair the foreman would advise the yard-master, and the latter would have the switch engine move the car to such place in the yard as he thought proper, and the foreman would have the needed repairs made.

Upon these facts it was held that the deceased and the engineer managing the engine, through whose negligence the injury was received, "were fellow-servants in such a sense as to subject them to the operation of the well-established rule, which refuses a remedy against a common master, in favor of one employee, who receives an injury, through the carelessness of another, while in the same line of duty."

The cases are so numerous and uniform that we refer to but one other, where the doctrine is carried much further, perhaps too far for us to give it our approval. *Wonder v. B. & O. R. Co.*, 32 Md. 410.

Nor do we give force to the argument that places the plaintiff's service in the duty of the inspector outside of those which he assumed as a carpenter. He made no objection to the service, had a dozen times before, as he himself states, undertaken it as incident to his employment, and voluntarily. He therefore stands upon the same footing as if this service was within the scope of his agreement. One who volunteers to act with other employees becomes one himself, so far as to introduce between them the same rule of legal responsibility.

Thus in *Skipp v. East Co. R. Co.*, 9 Exch. 223, where the force employed was insufficient to perform the service of attaching carriages of the baggage trains to the locomotive engine, but the plaintiff undertook to assist in the work, and while so engaged was injured, it was held that as he had before for several months been employed in this particular service, and had not made any complaint on the subject, he had no redress on the company.

So it was held in *Degg v. Midland R. Co.*, 1 Hurl. & Norm. 773, that the rule of law, that the master is not responsible to the servant for injury occasioned by the negligence of another servant, in

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the course of their common employment, "applies to the case of a person who is injured whilst voluntarily assisting the servants in their work." Accepting this as a correct exposition of the law, we find it difficult in the scant and unsatisfactory evidence before us, to fit the instruction to the proofs; and if not erroneous in itself, it was certainly calculated to mislead the jury, in determining the real and material issue involved in the controversy. We cannot perceive from the testimony that Thompson or any one else is lifted from his position as a co-servant, to that of a representative of the company, in an agency which makes it responsible for his negligent omissions or careless conduct, under the legal definition of a middle-man;" or if there was evidence to warrant the finding of the fact that it was to his negligence the accident was owing, so as to apply the rule to the plaintiff's case.

The immediate cause of the injury was the premature movement of the engine by Harris, and preceding and producing the movements, was the false direction given by Smith, upon one or both of whom liability for the consequences rests, and between them and the plaintiff the relation of fellow-servants is admitted to exist. It may be that upon a fuller development it will appear that the mishap is directly or indirectly owing to the want of attention and care on the part of some one, who may be proved to be a middle-man, but this was not shown, so as to render pertinent the instruction given in such general terms; nor was the instruction that the right to give an order resting in one employee, and the duty of obedience to it imposed upon another of itself, created the relation out of which springs the defendant's accountability to the latter for an injury suffered.

Without considering other exceptions, this fundamental error in the ruling entitles the defendant to have another jury, who shall be properly advised as to the law, to pass upon the case.

The verdict must be set aside, and a *venire de novo* awarded, in order to which let this be certified to the court below.

Error.

Judgment reversed.

Wilson v. Lineberger.

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(94 N. C. 641.)

Executors and administrators — contracts between.

An agreement between executors that one alone shall manage the estate is void.

PETITION for re-hearing. The opinion shows the point.*John Devereux, Jr., Jos. B. Batchelor and Geo. E. Wilson, for plaintiffs.**W. P. Bynum & R. W. Sandifer, for defendant.*

SMITH, C. J. The covenant, the specific performance of which, as a means of enforcing a lien upon the real estate described in the pleadings is demanded, embraces two distinct interests, one wholly personal to the contracting parties, the other the trust estate committed to the joint administration of the *feme* plaintiff and the defendant. The payment of the deferred purchase-money for her share in the land sold is to be secured by the conveyance of the estate of the debtor, thus charged by a mortgage deed while the defendant, left in charge of the trust estate of the deceased intestate, J. L. Lineberger, is forthwith to render an account of his administration, execute to his associate, the *feme* plaintiff, his note bearing interest at the rate of eight per cent payable in two years, and to be secured in like manner by mortgage of the same land. Preliminary to the ascertainment of the sum for which the defendant would be liable, it became necessary to have the partnership settled, whereof the intestate was a member, in order that his portion, as well as what was due under the guardianship committed to the defendant might be entered as credits upon the administration account proper. The protracted and complicated controversies which had to be, and have been, settled during the progress of the cause, have grown out of the administrations, and have necessarily delayed the execution of so much of the contract, as related to the ascertaining of the value of the assets of the intestate for distribution to the parties entitled. During this period, the duties common to both, acting as trustees under their joint appointment, have rested upon one, and the funds have not had the joint care and su-

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pervision intended. As understood by the plaintiffs, the obligation of the defendant covers the two preliminary, as well as the final accounts to be stated.

Not only does this arrangement comprehend the retirement of the administratrix from the management with a view to her being absolved from responsibility in the premises, but the mixing up of personal and trust matters in one and the same contract, may possibly lead to antagonism, a result not sanctioned in a court of equity; and we may repeat what is said in *N. C. R. Co. v. Wilson*, 81 N. C. 223, "the law frowns upon any act on the part of a fiduciary, which places interest in antagonism to duty, or tends to that result."

It is in this aspect of the case, we used the language repeated in the opinion now under review. "We are not prepared to uphold the contract in this feature, as one entitled to a specific performance, if its validity were now open to question." Such equitable relief is not of positive right to be demanded, but it is afforded under general rules of equitable action, it is true, in the exercise of a sound discretion, by the court.

But aside from this, without needless repetition, we adhere to the reasoning pursued in the opinion, and now called in question upon which the court refused to decree a specific execution of the contract upon the first hearing of the appeal. Notwithstanding the able and exhaustive argument and copious learning brought to bear upon the point, our convictions remain unchanged of the effect of the absence of averments necessary in sustaining the present claim, and which are not, because of their essential nature, waived by pleading over as now contended.

We therefore adhere to our former ruling and affirm the judgment.

Judgment affirmed.

EGERTON v. CARR.

(94 N. C. 648.)

Deed—post-mortem trust—construction.

An intestate executed a sealed instrument by which he declared that he left certain notes described therein to his son-in-law, C., in trust, to be equally divided between the intestate's three daughters described, after his death. The notes were delivered to C., and the instrument was recorded. *Held*, an irrevocable deed, taking effect at once.

ACTION to recover notes. The head-note states the case. The plaintiff had judgment below.

L. C. Edwards, for plaintiff.

Jos. B. Batchelor and John Devereux, Jr., for defendant.

SMITH, C. J. To be effectual, the sealed instrument can operate only in one of three ways, either:

I. As a testamentary disposition of the fund; or,

II. As a gift *inter vivos* of it to a trustee, for distribution among the intended beneficiaries, at the donor's death, the interest meanwhile accumulating; or,

III. As a *donatio causa mortis*, revocable during the donor's life, which partakes of the nature of both.

I. It cannot be upheld as a testamentary disposal of the notes, for the single sufficient reason, that it has not the required number of attesting witnesses; as a will whether professing to pass real or personal estate, must be made in the presence of not less than two subscribing witnesses, nor has it the requisite of a holographic paper. Code, § 2136.

II. It is not a gift *causa mortis*, for this must be given in prospect of approaching death, and not only was the donor not ill at the time, but she lived three years afterward.

A *donatio causa mortis* is said by BATTLE, J., delivering the opinion in *Overton v. Sawyer*, 7 Jones, 8, to be, "not a legacy, which requires the assent of the executor to vest the legal title in the donee, but it is a gift made in contemplation of death, which upon delivery, passes the legal title at once to the donee, upon condition to be void if the donor do not die."

III. If effective in passing an equitable interest in the securities then held by the defendant Carr (and the notes not being indorsed none other could vest), the instrument must be deemed to be a deed of conveyance, operating at once and irrevocable, and creating an equity in the daughters, capable of being enforced, when the time for division among them arrived. The court on the trial ruled that the writing, upon the face and in the light of surrounding circumstances, was, and was intended to be testamentary, and as it was legally insufficient to operate as a will, it could not operate at all and was void. The jury were accordingly directed to find the issue in favor of the plaintiff, and such was their verdict.

In passing upon the legal character and effect to be given to the act of the deceased in making the writing, we must not lose sight of the wholesome rule, which in the language of GASTON, J., "requires the courts to be benignant in the interpretation of solemn and deliberate acts, so that they may avail, if possible, rather than perish altogether."

The execution of the instrument was careful, and with a well defined intent not only conveyed in its terms, but orally made known at the time, to make a present provision for conferring a future benefit upon the object of the donor's bounty.

It purports to convert an agent into a trustee, and to attach trusts, which the defendant Carr by his assent accepts and agrees to discharge. The trusts involve the retention and management of the securities thereafter, not as before for the donor's benefit, and under her control, but to account for and pay over their accumulations at her death, thus vesting a present right in the donees, to have the fund secured, but not to be put in their possession until the happening of a future specified event, which must occur, though at an uncertain day.

The funds, which the donor declares "I leave" in the hands of the trustee become his, to hold and manage, and finally to divide among the daughters, for which ends an equitable interest at once is vested in him.

The only feature which gives a testamentary aspect to the paper, and upon which its nullity is made to depend, is found in fixing the period of enjoyment at the donor's death, while most of them point to a present and *inter vivos* act.

It is but a partial disposition of the intestate's estate. A person is designated to manage the funds during her life, and whose func-

tions cease with their delivery over when she dies, while the functions of an executor begin, just where those of the trustee end. There is no reservation of authority or of interest in them thereafter, such as are implied in a gift *causa mortis*. These are the qualities of a deed rather than of a will, and no attempt is made to put the instrument in the form required for the latter.

"It does not follow," we quote again from the opinion of the same learned judge, delivered in *Thompson v. McDowell*, 2 D. & B. Eq. 463, "because an instrument is to produce important results after death, that therefore it must be testamentary. To render it testamentary it is essentially necessary that it should be made to depend on the event of death, as necessary to its own consummation."

There were many features in the instrument, about which this was said, which were clearly testamentary, while there were others indicating action to be taken during life, and it was held to be a deed.

The safest test for determining the character of a written paper must be found in its provisions; whether it professes to be one or the other in name, is not at all conclusive. *Henry's Executors v. Ballard*, 2 Car. Law Rep. 595 (379); *Will of Belcher*, 66 N. C. 51.

In the latter case, the court, in referring to the other, inadvertently say the decision was that the instrument was testamentary, whereas it was upheld not to be a will but a deed, the court not having cognizance of the former.

When the character of the instrument, upon inspection, is left doubtful, the intention of the maker may be ascertained by the aid of parol evidence of surrounding circumstances. *Robertson v. Dunn*, 2 Murph. 133; s. c., 5 Am. Dec. 525; *Clayton v. Liverman*, 7 Ired. 92.

Assuming then, as we think to be manifest, that the instrument is in form and effect a deed, is there any legal impediment in the way of its operating to pass an equitable interest, coupled with legal power in the defendant, and a trust which can be asserted against him? We do not see any such impediment. The technical rules relating to land, which require a legal estate in the trustee, to which declared trusts must adhere, are not applicable to transfers of unindorsed notes for the payment of money, and more especially since under our present system the equitable owner not only may, but must sue in his own name upon them to recover the

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moneys due. Code, § 177; *Abrams v. Cureton*, 74 N. C. 523; *Wiley v. Gatling*, 70 N. C. 410.

The relationship of the beneficiaries to the donor, their mother, furnishes, if one were necessary, a sufficient consideration for the conveyance, as does the defendant's acceptance of the trust, an adequate consideration for its enforcement against him.

The whole subject is elaborately examined in the notes to *Ellison v. Ellison*, 6 Vesey, 656, as found in 1 White and Tudor's Leading Cases in Equity, 167, cited in the appellant's brief.

But the aid of a court of equity is not asked to enforce a duty assumed, and afterward repudiated by the trustee, for he resists the plaintiff's demand, in order that he may execute that duty freely to the *cestui que trust*, and carry out the donor's intent. The deed is an executed, in distinction from an executory instrument, and accomplishes its purpose by a direct transfer of the notes, and leaves nothing further to be done, except the distribution among the objects of the donor's affection and bounty.

The action is predicated upon the absolute nullity of the deed, or a supposed reserved power of revocation in the donor, or upon the idea that if the instrument cannot prevail as a testamentary disposition, it shall fail altogether. We do not concur in either view.

There is error, and there must be awarded a *venire de novo*, and in order thereto this will be certified.

Error.

Judgment reversed.

BROADNAX V. BAKER.

(94 N. C. 575.)

Ferry — right of public to pass up and down stream.

An exclusive franchise to maintain a ferry across a river does not prevent the public from using the river as a highway between points above and below.

ACTION for an injunction. The opinion shows the point. The injunction was granted below.

C. M. Busbee, for plaintiff.

W. H. Day, for defendants.

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SMITH, C. J. The franchise of keeping a public ferry, and demanding toll for transportation, resides in the State, and is so incident to riparian ownership, that it can be granted to none others than those who own the land at one or the other of its terminal connections, unless such proprietor or proprietors refuse to exercise it; when it may be conferred upon another, who can only obtain the right to use the soil for the purpose, by making compensation, and this even when those termini are public roads. *Pipkin v. Wynn*, 2 Dev. 402. This right to demand tolls in operating a ferry, sanctioned by the county authorities, with whom the power to establish it is deposited, exists at the common law, and every subtraction from its profits, by carrying its customers over the stream, for or without charge, is an injury for which an action will lie. It is the diminution in the number of customers that would use the ferry, but for the interference and reduction of tolls which measure the damages recoverable against the wrong doer. So by the common law it was necessary to show "that the termini of the plaintiff's ferry were between the points of such person's departure and destination as were in his route, and would have been passed by him, but for the defendant's wrongful interference." PEARSON, J., in *Taylor v. W. & M. R. Co.*, 4 Jones, 277.

To remove difficulties in the way of proofs, the general assembly passed an act by which it is provided that if any unauthorized person shall pretend to keep a ferry, or to transport for pay any person or his effects within ten miles, reduced to five by the amendatory act of March 12, 1883, ch. 381, of any ferry (being on the same river or water), which is already or hereafter shall be appointed, such person so pretending to keep a ferry or transporting any person or persons or their effects, shall forfeit and pay the sum of \$2 for every such offense to the nearest ferryman." Revised Code, ch. 104, § 31.

Substantially the same enactment is contained in the Code, § 2049.

The essential element involved in a ferry franchise is the exclusive right to transport persons and horses and vehicles with which they travel, as well as such personal goods as accompany them, from one shore to the other, over the intervening water for the toll.

A public ferry, then says ABINGER, C. B., in *Hussey v. Field*, 2 C. M. and R. 432, is a public highway of a special description, and

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its termini must be in places where the public have rights, as towns or vills or highways leading to towns or villa." An invasion of this exclusive right is not only restrained by the statutory prohibition against the erection and operation of another ferry, but the transportation for pay of persons or their effects, that is as we understand the latter word, the accompanying personal goods under their direct control, is forbidden within the prescribed distance above and below. The establishing of a new competing ferry is absolutely disallowed, while other methods of transportation become penal only when compensation is charged.

The defendants, according to the plaintiff's own showing, convey no persons for toll, and charge only for freight carried up and down the river, between the railroad and the numerous landings above, some even in the State of Virginia. They in no proper sense maintain a ferry, nor is their business of the same nature even assuming the plaintiff's exclusive franchise to extend to and embrace the carriage of freight as such, and as a separate and independent article of commerce. The defendants exercise the common right to use a navigable water which unites two States, without the special concession of the State or county authorities.

"It does not follow," we quote again from the opinion of Lord ABINGER, "from this doctrine" (the right of a ferry proprietor to be protected against an unlawful interference with his franchise by near and competing ferries), "that if there be a river passing by several towns or places, the existence of a franchise of a ferry over it from a certain point on one side to a point on the other precludes the king's subjects from the use of the river as a public highway, from or to all the towns or places upon its banks, and obliges them upon all occasions, to their own inconvenience, to pass from one terminus of the ferry to the other."

Not unlike language is used by the Supreme Court of the United States, SWAYNE, J., delivering the opinion, in the elaborately argued and well considered case of *Conway v. Taylor*, 1 Black, 603. There a ferry franchise was possessed by a riparian proprietor on the Kentucky shore, to run a ferry across the Ohio river at Newport, and in that State as here there were statutory prohibitions against the establishment of other ferries within one and a half miles over that river, and within a mile upon any other stream, nor was any new ferry to be granted within a city or town, unless required by an accumulation of business, to which the afforded

facilities were inadequate. In reference to the rights acquired under the authority of Kentucky to run the ferry and transport thence to the opposite river bank in Ohio, without the correlative right to do this from the latter shore, the court say:

"Those rights give them no monopoly, under all circumstances, of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those then prosecuting the business of commerce, in good faith, without the regularity or purposes of ferry trips, and seeking in no wise to interfere with the enjoyment of their franchise."

In *McRee v. Wilmington, etc., R. Co.*, 2 Jones, 186, the colonial legislature authorized the construction of a bridge over the north-east branch of the Cape Fear river, and forbade the keeping of any ferry, or the building of any bridge, or the setting any person or persons, carriages, cattle, hogs or sheep, over the river for fee or reward, within six miles of its location. The charter of the defendant company authorized the construction of a railroad over the tract of country which made necessary a pass-way over the river, and within the six miles mentioned. The action was for the penalty given for a violation of this conferred privilege, and the court held that if a construction was to be put upon the enactment, which would arrest all improved future modes of transportation, demanded by increased wealth, population and business, the monopoly would be in antagonism to fundamental principles, and "contrary to the genius of a free State." Bill of Rights, §§ 22 and 23; *Washington Toll Bridge Co. v. Commissioners*, 81 N. C. 491.

But the defendants are in the exercise of a common and undelegated right, to use the waters of a navigable river as a highway, in the carriage of goods, not primarily in the crossing, as a ferry is operated, from shore to shore, and between fixed landing places, but up and down the stream, there being a single stopping place within the prescribed limits. The right to use navigable waters is superior to any incident to the ownership of the shores, and this even when enlarged by the grant of an exclusive ferry or other franchise annexed to them. *Lewis v. Keeling*, 1 Jones, 299.

Navigable waters, constituting highways, are not ascertained here as they are in England, an island accessible to ocean tides, by the extent of their ebb and flow, but by a more practical test of their capacity to float boats used as instruments of commerce, in the interchange of commodities, and large enough for the purpose.

Such waters lose not their navigability, because intercepted by falls, when above and below them, the waters can be thus used for the purpose of commerce for long distances. Under such circumstances they remain highways for common use. Such is the condition of many of our large rivers, and was of the Ohio itself, near the city of Louisville, until the impediment was overcome by works erected there.

The defendants' boats, with capacity to transport twenty bales of cotton, or 9,000 pounds of freight each, ascend and descend the river for more than forty miles, passing the State boundary, and as a common carrier receiving and delivering goods at places along the route, and thus transferring the products of the farm to the railroad, and meanwhile bringing supplies to the farmers, touching at a single point in the prescribed distance, and this point two miles further up the river.

Can the maintenance of such a line of transportation be deemed an exercise of rights, intended to be inhibited by the restraining statute? Is it in any proper sense an invasion of the plaintiff's franchise? Does the statute mean to deny the facilities possessed by those who find Mason's landing a convenient point of shipment, and compel them to carry by wheels what they may raise over the needless space of two or more miles to the plaintiff's ferry, in order that they may have the tolls for ferrying it over? We do not so interpret the prohibitory legislation. The essential element in a ferry is the transportation over interrupting water—a crossing from shore to shore, at points conveniently opposite, and forming connection with thoroughfares at each terminus. A ferry is defined by Mr. Webster, in words borrowed from legal authorities, to be “a liberty to have a boat for passage upon a river, for the carriage of horses and men for a reasonable toll,” adding, “It is usually to cross a large river.” Tomlin Law Dict.

It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water, the essential idea of passing from one shore to an opposite shore being retained.

We are not disposed to hold, upon the evidence, and with the defendant's denial that they carry any person in their boats for fee or reward, that they are invading the franchise possessed by the plaintiffs, or any just right derived under it.

The action moreover is not alone for remuneration for loss in damages, but for the recovery of penalties for multiplied alleged offenses, and the aid of the court is sought as an ancillary remedy.

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But a court of equity leaves one pursuing this course to his strict legal rights, and withholds its aid. One seeking equity must do equity, and be content with full indemnity for actual loss sustained. Thus a debtor charged with usurious interest, will be as a condition of relief required to pay the debt he owes with legal interest, or if the bill be filed by the creditor, he must forego his demand for the penalty, and be satisfied with such compensation as measures his loss, or is the just amount of his claim.

"It is against the general principles of equity," remarks Story, "to aid in the enforcement of penalties or forfeitures." 2 Story Eq. Jur., §§ 1319 and 1494.

This rule of action is not abrogated by the union in one tribunal of the functions formerly divided between two, while each exercises those peculiar to itself, but the underlying principles of action are the same and unchanged.

There is error in the ruling, and this will be certified to the court below.

Error.

Judgment reversed.

PUITT V. COMMISSIONERS OF GASTON COUNTY.

(4 N. C. 709.)

Constitutional. — taxation for schools — equality.

A law declaring a tax on the polls and property of persons of one color for the exclusive education of children of that color is unconstitutional.

ACTION for injunction. The opinion states the case. The injunction was denied below.

W. P. Bynum and R. W. Sandifer, for plaintiffs.

Geo. F. Bason and John Devereux, Jr., for defendants.

SMITH, C. J. While in this action for a perpetual injunction against the collection of a certain tax, levied by the commissioners in further support of free education of children of the white race alone, which under our former system of judicial administration would be exclusively cognizable in a court of equity, we would be required to look into the evidence, if properly taken and sent up, and ascertain what facts are proved, the parties are content to abide

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by the findings of the court, as the facts upon which we are to declare the law. They are as follows:

The defendants, the board of commissioners of Gaston county, under the provisions of the act of March 8, 1883, the Code, §§ 2594, 2595, caused an election to be held in school district No. 21 for white children, and to be submitted to the white electors therein for approval or rejection, a proposition for an additional tax of twenty cents on the \$100 worth of property therein, belonging to white owners, and sixty cents upon each taxable white poll, for furnishing increased free educational advantages to the white children of the district. At the election held accordingly on December 6, following, at which, while there were colored electors, none but white electors were allowed to vote, twenty-five votes were cast for, and twenty against the proposition, whereupon the commissioners declared it to have been carried by a majority of five votes, and directed their clerk to make out a tax list, and place the same in the hands of the sheriff, which has been done, and the sheriff is proceeding to collect said assessment.

By the act to incorporate the town of Dallas (Private Laws, 1871-72, ch. 46), it is provided that the town of Dallas shall constitute a school district.

The boundaries of school district No. 21 were established in 1868, and embrace a larger territory, including more persons, voters and property, than are comprised in the corporate limits of the town of Dallas, and the boundaries of said school district have been retained as in 1868, up to the present time, and no action has ever been taken under the charter of the town of Dallas to conform the limits of the school district to the limits of said town.

If the colored voters had been allowed to vote, twenty-five would not have been a majority of the qualified voters therein, either as the district is recognized, or as it would be if confined to the limits of Dallas.

That there were sixty-three qualified white voters residing within the limits of school district No. 21 at the time of said election.

The said tax list contains a tax or assessment of twenty cents on the \$100 worth of property in said district belonging to white persons, and sixty cents on the polls of the white persons residing therein, and none on the property or polls of colored persons resident therein, though there are several who reside and own property, subject to taxation therein.

A large amount of said tax or assessment is upon property and polls of persons, situate and resident outside of the corporate limits of the town of Dallas.

That the collection of said assessment will not have the effect to produce a depreciation in the value of the property subject to such assessment. As a matter of law, that the levy and collection of said assessment is not in violation of the Constitution or the laws of the State.

It is therefore ordered that the restraining order heretofore granted be dissolved, and that the plaintiffs pay the costs of this application, to be taxed by the clerk.

From which order the plaintiffs appeal to the Supreme Court.

The first section of the act prescribes the manner, such as was pursued in the present case, of ascertaining the will of the white voters on the proposed assessment in aid of schools in the district; and upon an approval, directs the further action mentioned in the next three sections, which are as follows:

§ 2. In case a majority of the votes cast at said election shall be in favor of such assessment, the board of commissioners shall direct their clerk to make out from the tax list of the township in which such district is situate a list of all the taxable property and polls of the white or colored tax-payers, as the case may be, in such district, and it shall be the duty of the school committee of such district to aid the clerk in making out said list; and said clerk shall deliver said list to the sheriff of the county, with an order signed by him, commanding the sheriff to collect said assessment in like manner as provided for the collection of State and county taxes; and said sheriff shall collect and pay over the same to the county treasurer. And said sheriff's bond shall be liable therefor, as provided in case of the county school tax.

§ 3. No election under the two preceding sections shall be held more than once in any one year.

§ 4. The assessment thus levied and collected from the taxable property and polls of white persons shall be expended in aiding to keep up the public school in said district for white children of both sexes, between the ages of six and twenty-one years; and the assessment thus levied and collected from the taxable property and polls of colored persons shall be expended in aiding to keep up the public school in said district for colored children of both sexes, between the ages of six and twenty-one years.

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The act granting a charter to the town of Dallas, ratified and taking effect on January 23, 1872, contains*the following section:

That the corporate limits of the town of Dallas shall constitute a school district, and that all taxes levied upon the same by the State for school purposes shall be expended in conformity with the State regulations in establishing graded schools within the towns; and for the advancement of this purpose, the commissioners may appropriate a sufficient sum belonging to the corporation to supply the deficiency, and the board of commissioners shall select a school committee for the purpose of supervising said schools, and to perform the duties now prescribed by law. Private Acts 1871-72, ch. 46, § 45.

The appellants' claim to be relieved of the tax by a restraining order, to be made permanent on the final hearing, rests upon several grounds, and these are:

I. The school district, as comprised within the corporate limits of the town of Dallas, under the act, is that wherein the will of the electors regarding the proposed tax should have been collected by a vote; and none of the electors outside, though within the boundaries of school district No. 21, should have been permitted to vote. If this be the result of the legislation, and the area covered by the town be withdrawn from the territory originally formed into a school district, the election was not held in conformity with the law, and is void under the rulings in *McCormac v. Commissioners*, 90 N. C. 441, and *Caldwell v. Commissioners*, 90 N. C. 453.

But we do not dispose of the case upon this point, since the statute creates this district to bring it under the operation of the law in reference to graded schools, removing the disability of a want of sufficient population to come under the general law, and may admit of a construction that leaves the former district undiminished in territory for ordinary purposes.

II. The appellants' principal objection, and this is the essential point decided in the court below and brought up for review, is based upon an alleged repugnancy of this legislation to the Constitutions of both the State and Federal governments.

They insist that it is not uniform in its operation upon taxable property and persons, as is required by the State Constitution, art. 5, §§ 3 and 6, and art. 7, § 9.

The counties are directed to be divided into school districts by the Constitution, and each becomes, with the consent of the general

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assembly, a taxing territory, and remarks BYNUM, J., delivering the opinion in *Kyle v. Fayetteville*, 75 N. C. 445, "whenever the power (of imposing taxes) is exercised, all taxes, whether State, county or town, by force of the Constitution, must be imposed upon all the real and personal property, money, credits, investments in bonds, stocks, joint stock companies or otherwise, situate in the State, county or town, except property exempted by the Constitution."

And again: "It is the provision and was the purpose of the Constitution, that thereafter there should be no discrimination in taxation in favor of any class, person or interest, and that every thing, real and personal, possessing value as property and the subject of ownership, should be taxed equally and by a uniform rule."

The principle of uniformity pervades the fundamental law, and while not in the Constitution applied in express terms to the tax on trades, professions, etc., necessarily underlies the power of imposing such tax, and a tax not uniform, says RODMAN, J., "would be so inconsistent with natural justice, etc., that it may be admitted that the collection of such a tax would be restricted (restrained as unconstitutional." *Galling v. Tarboro*, 78 N. C. 119.

So Mr. Justice MILLER, defining the term as used in the Constitution of Illinois, says that while one tax may be imposed upon innkeepers, another upon ferries, and a still different tax on railroads, the taxation must be the same on each class, that is, the same tax upon all innkeepers, upon all ferries, and upon all railroads, in their respective classes as taxable subjects. *Railroad Tax cases*, 92 U. S. 575.

To the same effect is *Worth v. Railroad*, 89 N. C. 301, wherein is quoted with approval this language, used by the Supreme Court of Ohio: "Taxing by a uniform rule requires uniformity, not only in the rules of taxation, but also uniformity in the mode of assessment upon the taxable valuation."

The proceeding conducted under the statute in the present case widely departs from uniformity, the fundamental condition of all just authorized taxation under the Constitution. It marks a color line among the qualified voters of the same territorial district, admitting only of the votes of white men in the white district, and colored men in the colored district, in determining in their respective districts the question of an increased assessment for the

schools. The question rests wholly upon race, in this, as in the other provision, which confines the taxation to the property and persons of the one or other of the classes thus divided, as the case may be. The same difference runs into the application of the funds. Those derived from one class are devoted to the education of the children of that class only, and denied to the children of the other, a distinction which finds no countenance in the Constitution, but is alike opposed to it in its general structure and in its details.

Suppose the principle was carried out and made applicable to the entire county — and the school districts are but divisional parts of the county — is it not obvious it would be subversive of the equality and uniformity recognized in the system of public schools, which looks to a fair participation of all its citizens in the advantages of free education?

If the separating line can be thus run, why may it not be between children of different sexes, or between natives and naturalized persons of foreign birth, or even between the former and citizens of other States, removing and settling in this State?

These considerations clearly indicate the incompatibility of such legislation, partial in its operation with the equality established in the Constitution, and to which all legislative action must conform, in order to its being valid.

The special race distinction, moreover, is in conflict with the concluding clause of article IX, § 2, which, after directing that instruction shall be given to children of the two races in separate public school, declares that "there shall be no discrimination in favor of or to the prejudice of either race."

Now it is obvious that there would be no occasion for such a discriminating enactment, if the results would be the same as to a tax imposed upon all taxable subjects within the district, and fairly distributed, so as to secure similar advantages in obtaining an education to all the school children of either race.

Nor can we shut our eyes to the fact that the vast bulk of property, yielding the fruits of taxation, belongs to the white people of the State, and very little is held by the emancipated race; and yet the needs of the latter for free tuition in proportion to its numbers, are as great or greater than the needs of the former. The act, then, in directing an appropriation of what taxes are collected from each class, to the improved education of the children of that class,

does necessarily discriminate "in favor of the one to the prejudice" of the other race.

It can make no difference that the property of the white people raises the means which are expended in the education of white children, since the fund is raised by the exercise of legislative coercion and becomes common to all, and to be used for the general benefit. It is in no sense a voluntary contribution, for with such the law does not interfere, but the results are reached by legislative action, contingent upon an approval by partial voting, but not the less legislative action for that reason, and therefore this suit is instituted by unwilling tax payers to arrest the collection.

The general views we have expressed have not been seriously controverted in the argument here in support of the ruling below, but it is sought to defend the legislation as belonging to the class of local assessments, such as have been upheld in cases where a large boundary fence, dispensing with a necessity for interior individual fences, is built and to be maintained at the expense of the lands thus inclosed and benefited. It is unnecessary to refer to these adjudications, as they have been considered and the principle governing them declared in *Busbee v. Commissioners*, 93 N. C. 143.

These local assessments are not made under the restraints applicable to the exercise of the general taxing power for the public good. They are put alone upon the property assumed to be benefited by the proposed improvement, and not upon other which derives no special advantage from the expenditure. "The principle underlying local assessments conferring special advantages upon land," in the words used in the opinion in this case, "is but an application of the maxim illustrated and applied in *Norfleet v. Cromwell*, 64 N. C. 16, "*qui sentit commodum, debet sentire et onus.*"

The doctrine finds legislative recognition and support in the Code, § 2824, which imposes upon the lands inclosed by a common fence, the expense of its construction and maintenance.

The statute does not provide for cases of a local assessment, but is general in its terms, and applicable to every school district in the State, and thus partaking of the character of general legislation, the tax is put upon every species of taxable property therein, except in the distinction of race ownership.

Nor do we question the right of local taxation for special local interests, not dependent upon the benefits thence accruing to prop-

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erty. The difference in these cases is pointed out in the work of Mr. Burroughs on Taxation, 406, whose words, referring to the establishment of a school as a source of advantage to local residents, we have quoted in *Busbee v. Commissioners, supra*.

"Whenever a system of public instruction is established by law" (we quote from Judge Cooley's work on Taxation, 478), "to be administered by local boards who levy taxes, build school-houses and employ teachers for the purpose, it can hardly be questioned that the State, in establishing the system, reserves to itself the means of giving it complete effect and full efficiency in every township and district of the State, even though a majority of the people in such township or district, in a want of proper appreciation of its advantages, should refuse to take upon themselves the expense necessary to give them a participation in its benefits."

"The legislature may authorize or make local public improvements by local taxation." 2 Desty Tax. 1119.

"The imposition of taxes for educational purposes, or for maintaining the common school system, is for a public purpose." 2 Desty Tax. 1118.

The principles of equality and uniformity are indispensable to taxation, whether general or local. Local taxation must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; and must be assessed upon all the property according to its just valuation.

"Whatever may be the basis of the taxation," are the words of Judge COOLEY in his other work on Constitutional Law, 499, 622, "the requirement that it shall be uniform is universal. It applies as much to these local assessments as to any other species of taxes."

These references suffice to show that in authorized local taxation for the general good of the residents within the tax district, as distinguished from those within the principle which includes large territorial boundary inclosures, it must be levied in accordance with the constitutional requirements, and the property of a class cannot be singled out to bear the burden of which the property of another class is relieved. These universal conditions are disregarded in the present enactment, and the distinction can no more be drawn between different owners than it can be between different kinds of taxable property of the same owner, alike subject to an *ad valorem* tax.

In the opinion we have expressed of the operation of our own

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Constitution upon such discriminating legislation, it is unnecessary to inquire into its consistency with the recent amendments made to the Constitution of the United States. The essence of these provisions is to secure equal civil rights to all the citizens of a State, and especially to protect the newly enfranchised colored people, added to the body politic, in their possession and use. But they did not annul the statute long in force, which from considerations of public policy forbids a marriage between a white person and a negro, as expressly held in *State v. Hairston*, 63 N. C. 451, and recognized in *State v. Kennedy*, 76 N. C. 251; s. c., 22 Am. Rep. 683. Nor are they repugnant to the clause in the State Constitution, which provides for the instruction of the different races in separate schools. This is so decided in *State v. McCann*, 21 Ohio, 208; opinion of BAXTER, C. J., in *United States v. Buntin*, 7 Fed. Rep. 730, April 4, 1882, and in the concurring opinion of CLIFFORD, J., in *Hall v. DeCuir*, 95 U. S. 485-504.

In the latter opinion is reproduced the ruling in the case in Ohio, in these general terms: "That court held that it worked no substantial inequality of school privileges between the children of the two classes, in the locality of the parties; that equality of right does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school; and that any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either."

To the same effect are *Roberts v. Boston*, 5 Cush. 198; *State v. Duffy*, 7 Nev. 342; *Clark v. Board of Directors*, 24 Iowa, 266; *Dallas v. Fosdick*, 40 How. Pr. 249; *People v. Gaston*, 13 Abb. Pr. (N. S.) 100.

It is not therefore every distinction dependent upon race or color that comes in conflict with the Federal Constitution, but only when it produces inequality in rights or interests; and when this is the result the State legislation from which it flows is rendered inoperative. When the same essential privileges are secured to all, such legislation is valid, and rests in the sound discretion and views of public policy of those who make the law.

We think there is error in the ruling of the court, and that the restraining order should have been continued. Let this be certified

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to the Superior Court of Cleveland, that further proceedings be therein had according to law.

MERRIMON, J., concurring. I concur in the judgment of the court, upon the ground that the defendants failed to observe the requirements of the statute, (Acts 1871-72, ch. 46); but I do not concur in so much of the opinion of the court as declares the statute (Acts 1883, ch. 148, §§ 1, 2; Code, §§ 2594, 2595), inoperative and void. I am of opinion that the latter statute authorizes in effect a local assessment, and does not prescribe a public tax, in the sense of the Constitution, and that local assessments are not necessarily confined to particular real property to be affected by them favorably, in contemplation of law.

Error.

Judgment reversed.

STATE V. WEAVER.

(84 N. C. 838.)

Criminal law — forgery — railroad pass — indictment.

A railroad pass may be the subject of forgery, but it is not sufficient simply to allege in the indictment the forgery of a railroad pass, setting it out. The extrinsic circumstances, showing the authority of the officer whose name is forged, and the obligation of the company to honor it, must be averred. (See note, p. 649.)

CONVICTION of forgery. The indictment was as follows: "The jurors for the State, upon their oath, present, that John Weaver, late of the county of Orange, on the first day of January, 1885, with force and arms, at and in the county of Orange aforesaid, of his own head and imagination, did wittingly and falsely make, forge and counterfeit, and did then and there wittingly assent to the falsely making, forging and counterfeiting a certain paper writing, commonly called a railroad pass, which forged writing is as follows, that is to say: 'Hilsboro, N. C., October 17th, 1885 — Conductor will please pass this man to Graham and return, J. B. Rosemond,' with intent to defraud, against the form of the statute, in such case made and provided, and against the peace and dignity of the State."

Attorney-General, for State.

No counsel for defendant.

MERRIMON, J. It is very obvious that the indictment charges no offense created by any statute of this State in respect to forgery, and we are of opinion that it cannot be sustained at common law.

"The order, request, or "railroad pass," as it is called, is very indefinite and uncertain in every aspect of it. It does not purport, upon its face, to be given by a person who had any authority to grant it, or to create any possible obligation on his part, to make it good or effective in any contingency, nor does it create or express any purpose to create any, the slightest, obligation upon the "conductor," whoever he was, or whatever his business, to accept it, and comply with the request contained in it, or to create any liability in any way upon any person. Nor does it appear to whom it was given, or that it was given for any consideration of value. So far as appears from the order itself, or any averment in the indictment, it had no binding effect, and could not operate so as to injure or defraud any person. It was a simple, naked request, in favor of any person who might hold it.

To constitute the offense of forgery at common law, the paper, writing or instrument forged must be executed with a fraudulent intent, and be such as may prejudice, or as would or might, if genuine, operate to create a liability of another person. The false instrument must be such as does or may tend to prejudice the right of another, and such tendency must be apparent to the court, either from the face of the writing itself, or from it accompanied by the averment of extraneous facts that show the tendency to injure. If the forged writing itself shows such tendency, then it will be sufficient to set it forth in the indictment, alleging the false and fraudulent intent; but where such tendency does not so appear the extraneous facts necessary to make it apparent must be averred. This is essential so as to enable the court to see in the record that the indictment charges a complete offense. *State v. Grenier*, 1 Dev. 523; *State v. Thorn*, 66 N. C. 644; *State v. Lamb*, 65 N. C. 419; *People v. Shall*, 9 Cow. 778; *People v. Harrison*, 8 Barb. 560.

As we have seen, the alleged forged writing in this case, did not of itself and upon its face tend to prejudice any person. It may be however that the person whose name is subscribed to it was the

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agent of a railroad company, and had authority to issue such a "pass" for a consideration—that the paper was given to some particular person—that the conductor was agent of the railroad company, and authorized and required to receive and act upon such a paper—it may be that there were facts and circumstances that would have shown that the paper did constitute the offense of forgery. If so such material facts should have been properly averred, in connection with the writing, in the indictment. It is not sufficient to simply designate the paper as a "railroad pass"—it must appear and purport in some way, and with reasonable certainty, to be such pass, to constitute forgery. A railroad ticket or pass may be the subject of the offense at common law. *Commonwealth v. Ray*, 3 Gray, 441; *Regina v. Boulton*, 3 Car. & Kir. 604 (61 Eng. C. L. 603). The court properly arrested the judgment.

Let this opinion be certified to the Superior Court, to the end that further proceedings may be had according to law. It is so ordered.

No error.

Judgment affirmed.

NOTE BY THE REPORTER.—This case is supported, as to the first branch of the syllabus, by *Commonwealth v. Ray*, 3 Gray, 441, which was an indictment for forgery of a railroad ticket. The court then said: "It is said that this instrument does not import a contract or promise of any kind. We think otherwise, and that although it is wanting in details of language fully stating the nature and extent of such contract, it has written language sufficiently indicative of a promise or obligation to render it an instrument of value, by the false and fraudulent making of which the rights of others would be prejudiced. This false instrument would, if genuine, have created a liability on the part of the New York Central Railroad Company to carry the holder thereof from Albany to Buffalo, and would therefore have been a contract of value in the hands of a third person." The ticket read: "New York Central Railroad. Albany to Buffalo. Good this day only, unless indorsed by the conductor. D. L. Fremyre." But the indictment averred the legal effect of the ticket, and that Fremyre was the ticket agent, etc.

In *Regina v. Boulton*, 3 Carr. & K. 604, the indictment was for forging, and for uttering, knowing it to be forged, a railway pass, in terms substantially like that in the principal case, the indictment containing no extrinsic averments. The objection was taken that the indictment did not allege a course of business in the company as to passes of this kind, but no decision was pronounced on that point. The instrument was pronounced subject of forgery, but not of uttering without proof of actual fraud.

"Let A., the bearer, have what articles he wants, and present bill to be paid on first of month at my office, George Spaulding, steamboat agent." *Held*, subject of forgery. *Allen v. State*, 74 Ala. 557.

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In *Hobbs v. State*, 75 Ala. 1, an indictment for forgery of the following instrument was sustained: "Please send me word how long you will give Stephen to pay for the bed, and if you will allow him time enough to pay for it let him have a cheap bureau as cheap as possible and I will see that you get so much a week and oblige J. W. Wall, Huntsville. Just write it off the whole thing and send it to me."

STATE V. COVINGTON.

(94 N. C. 912.)

Criminal law — forgery — misspelled signature.

An indictment will lie for the forgery of an obligation for the payment of money although the signature is misspelled. (*See note, p. 651.*)

CONVICTION of forgery of an order for the payment of money, purporting to be signed by J. M. Haywood, whose name was written "J. M. Hawood."

Attorney-General, for State.

Platt D. Walker, for defendant.

MERRIMON, J. The constituent elements of the crime of forgery at common law are the false making or alteration of the writing or instrument forged, the fraudulent purpose, and the tendency and capacity of it to prejudice the right of another person.

If such tendency and sufficiency of the instrument appear upon its face, it will only be necessary to aver its false and fraudulent nature, setting forth an exact copy of it in the indictment. If however these do not appear, but there are extraneous facts that make the instrument have such tendency and therefore the subject of forgery, those facts must be averred in connection with it in such apt way, as will make the tendency appear. This is necessary because the court must see that the complete offense is charged.

In this case the tendency of the writing forged to prejudice the right of another plainly appears. Obviously if the order had been genuine, the maker of it would certainly have been liable, if the person to whom it was addressed has, in compliance with it, supplied the money or goods in lieu of it, notwithstanding the infor-

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mality, and the misspelling of the name of the maker. It is true, as contended by the appellant's counsel, that the order must have resembled a genuine one, and been such as might have deceived or misled a reasonable person; but this does not imply that it must have been perfect and orderly in form and correctly spelled the names of the persons mentioned in it. A genuine order might be informal or slightly incomplete—some of the words misspelled, a firm addressed not precisely by its name, the maker might in his haste or by inadvertence omit a letter from his name, some or all these imperfections might appear upon careful examination, and yet a reasonably cautious business man might, would, frequently accept such order, attributing the irregularities to haste and inadvertence in some respects perhaps to lack of accurate information. Orders for goods and the like are often drawn hastily, carelessly. Many business men pay little attention to spelling or forms, and moreover haste in the course of business will not allow of strict scrutiny of orders presented to be acted upon promptly. If therefore the false and fraudulent paper writing be such as that it might from its nature and the course of business, deceive or mislead to the prejudice of another person, the offense of forgery would be complete.

The order in question was such a one. If genuine, a reasonably cautious man might, probably would, take and act upon it, if he knew the person making it, and had or would like to have, business relations with him. It might be incautious, but not unreasonable to accept and act upon it, in the course of business. Indeed the person to whom it was addressed did so. *State v. Thorn*, 66 N. C. 644; *State v. Leak*, 80 N. C. 403; *State v. Lane*, 80 N. C. 407; *State v. Keeler*, 80 N. C. 472; Archbold's Cr. Pl. 345; *State v. Murray*, *ante*, at this term.

The indictment does not charge an offense under the statute, but at common law. It was therefore unnecessary, indeed not proper to conclude against the statute. This however may be treated as surplusage. *State v. Lamb*, 65 N. C. 419; *State v. Leak*, *supra*.

There is no error. The judgment must be affirmed and to that end let this opinion be certified to the Superior Court.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Lemasters v. State*, 95 Ind. 387. the instrument was signed, "John T. Mozniga," with no mark. *Held*, a sufficient mark.

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signing. The court said "It is earnestly insisted by the appellant's counsel, that in the absence or for the want of this mark, the promissory note had not been signed or executed by the maker and had no legal effect, and therefore it could not be the subject of forgery. Counsel say: The note upon its face shows that it is incomplete, that it was intended to be signed by the maker by his mark, and his mark not being there it could deceive no one and must be held in law, upon its face, as an unsigned and unexecuted note. This is a simple charge of forgery, no extrinsic matter is averred, and hence we must look to the face of the note for its legal bearing."

"The promissory note set out in the indictment was manifestly prepared from a printed blank form, and it is perfect and complete in all its parts, except, as we have said, that there is no mark in the space where it was apparently intended that the maker of the note should insert his mark. Whether or not such a note so executed would or could deceive any one is a question of fact for the jury and not of law for the court." The case at bar is very similar to *Harding v. State*, 54 Ind. 359, and substantially the same objection was taken to and the same argument made against the sufficiency of the indictment in the case cited as in this case. The court there said, "The argument of appellant's counsel is this. Appellant was indicted for forging a promissory note; it appears upon the face of the indictment that the instrument forged was not a promissory note, and therefore his conclusion is, the indictment was insufficient and ought to have been quashed. But from our standpoint the argument is unsound and illogical. In our view of the case appellant was indicted for forging a certain instrument, which is set out in the indictment; we look to the copy of the instrument and not to the name which may be given the instrument to determine whether or not the instrument appears on its face to be of such a character that a charge of forgery could be predicated thereon. When we find, as we do in this case, that the indictment charges the forgery of an instrument which appears on its face, from the copy thereof set out in the indictment, to be naturally calculated to have some effect,"—we cannot hold, as a matter of law, that the indictment ought to be quashed, merely because of some technical defect or imperfection requiring close scrutiny to discern it in the execution of such instrument. To the same effect, substantially, are the cases of *Reed v. State*, 28 Ind. 396, and *Powers v. State*, 87 Ind. 97."

In *Harding v. State*, 54 Ind. 359, the indictment was for forgery of a promissory note in which the payee's name was left blank. *Held*, valid.

In *Potter v. State*, 9 Tex. Ct. App. 55, the instrument as set forth in the his

indictment was alleged to have been signed, "daudle x oulal;" while the proof was of David Aeri. *Held*, a fatal variance.

In *Peete v. State*, 2 Lea, 513, the instrument as set forth was signed "W Cpell," while the person intended was "W. E. Capell." The signature bore a general resemblance to the genuine one, and the court said: "Being written on horseback, it was well calculated to deceive," etc., and the conviction was affirmed.

In *State v. Bauman*, 53 Iowa, 68, "John Singleton" was held to answer for "John T. Singleton."

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In *State v. Lane*, 80 N. C. 408, the instrument was addressed to "Dulks & Helker" and signed "J. B. Runkins," intending Helker & Duts and J. B. Rankin. *Held*, no variance.

In *Abbott v. State*, 59 Ind. 70, an instrument signed "elirere lowtrheiser" was held not a forgery on its face when Ezra Loutzenheiser was intended.

STATE V. FANNING.

(94 N. C. 940.)

Criminal law — affray — provoking an assault.

If one by public abusive language or offensive conduct intentionally induces another to strike him, he is guilty of an affray, although he does not return the blow.

CONVICTION of an affray. The opinion shows the point.

Attorney-General, for State.

No counsel for defendant.

SMITH, C. J. It will be observed, that the instructions asked differ from those delivered, in the very material fact, that while the latter are full, and embrace the whole case as developed by the witnesses, the former are partial, presenting only such facts as occurred after the parties emerged from the storeroom, ignoring what preceded, and may have been the cause of the difficulty, culminating in the fight afterward. Most obviously, the case was properly presented the jury in the charge, and in as favorable a light for the defendant, as he could reasonably ask. The jury were directed to consider all the evidence, and ascertain from it, whether the defendant willingly entered into or by his words and acts, provoked and brought about the violation of the public peace that ensued. If he did, he is criminally responsible for the consequences, notwithstanding his forbearing conduct when stricken and shot at. The test of guilt in such cases, is thus stated by BATTLE, J.: "If one person, by such abusive language toward another, as is calculated and intended to bring on a fight, induces that other to strike him, he is guilty, though he may be unable to return the blow." *State v. Perry*, 5 Jones, 9.

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And this tendency and intention may be indicated by conduct as well as by words.

While the later conduct of the Brittain's *flagrante bello* was extremely violent, and out of all apparent proportion to provocation offered, and that of the defendant was forbearing and defensive, after the parties came out of the store, there was evidence, in the beginning, of an aggressive purpose in the defendant, when with gun in hand he followed the Brittain's as they entered the store of the father, the sequel of which was seen soon after in the retreating of one, with face toward the others, his pursuing antagonists. The inference from this, it was for the jury to infer, and they find in accordance with the charge, that the defendant was a willful participant in the act of violence from which he was the sufferer.

The evidence may be slight, but it was such as authorized the jury in passing upon it, to arrive at their own conclusion as to the defendant's guilt. This is their province, and when there is any reasonable evidence to warrant the verdict, it must be allowed to stand so far as this question is involved.

There is no error, and this will be certified, to the end that the court below proceed to judgment.

Judgment affirmed.

CASES

IN THE

SUPREME COURT

OF

MICHIGAN.

McCOOL V. CITY OF GRAND RAPIDS.

(66 Mich. 41.).

Municipal corporation — defect in street — loose stones.

A horse while being driven on a city street was injured by stepping on one of several loose cobble-stones lying scattered on the surface of the street in sight of the driver. *Held*, by an equal division of the court, that an instruction to render a verdict for the defendant should not be disturbed.

ACTION for injury to a horse by a defect in a street. The head-note states the case.

Frank A. Rogers and Moses Taggart, for appellant.

J. W. Ransom, for appellee.

CHAMPLIN, J. How. Stat., § 1443, provides that if any horse shall receive any injury or damage by reason of neglect of any city to keep in repair any public street, the city whose duty it is to keep such public street in repair shall be liable to, and shall pay the owner thereof, just damages which may be recovered in an action on the case, provided, that in all actions brought under the act imposing the liability, it must be shown that such city has had reasonable time and opportunity, after such street became unsafe or

unfit for travel, to put the same in proper condition for use, and has not used reasonable diligence therein.

This act is brought to recover under this section of the statute, damages for an injury to plaintiff's horse, occasioned by stepping upon a stone and breaking the horse's leg.

[Omitting declaration.]

The plea was the general issue. After the evidence, which is all returned in the record, was introduced, the judge of the Superior Court instructed the jury to return a verdict for the defendant. The only exception taken is general and is in these words: "We take an exception to the ruling of the court."

The instruction of the court was proper for two reasons:

1st. Because of the contributory negligence on the part of plaintiff's servant. The plaintiff was a butcher, and at the time of the injury the horse and wagon of plaintiff was being driven by his hired servant in delivering meat to plaintiff's customers. The negligence of which the defendant was guilty consisted, as alleged in the declaration, of allowing a large amount of small stones, commonly called "cobble-stone," to accumulate, gather and remain for, to-wit, thirty days preceding the accident in the street, which at that point was covered and full of said small stones, which rendered it reasonably unsafe and unfit to travel along and upon, and that defendant's servant, without fault or negligence, was driving plaintiff's horse along Cherry street, and by reason of said stones being in the street, the horse stepped upon one of the stones, and was then and there injured and his leg broken.

The evidence of plaintiff showed that there were scattering stones in the street "from the size of a goose's egg to six inches in diameter," and that they were plainly to be seen by a person driving along the street before they were reached from the direction the plaintiff's servant came. Several of the plaintiff's witnesses testified that it was unsafe to drive a horse through that portion of the street on account of the number of stones in it. One of plaintiff's witnesses testified that "it wouldn't be very safe for a man to run a horse through, but it would be safe if a man should drive careful." The plaintiff's servant testified that he reached the stones about twenty or twenty-five feet after he left Sheldon street, and the accident occurred about fifty-five feet from Sheldon street, and that he was driving on a slow trot. If the street was in the condition described by plaintiff's witnesses, it was certainly a careless

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and negligent act for the plaintiff's servant to attempt to drive over such defects upon a trot, and it is quite clear that the accident would not have happened if the man had driven carefully. The accident happened in the day-time, and the defects were plain to be seen, and the driver does not claim that he did not see them in time to reduce the speed of his horse to a walk. Where defects are obvious in a street, such as are alleged to exist here, and a person willfully or negligently keeps on at a rapid speed and neglects to exercise that care which the circumstances require of him, and an injury is produced in consequence of such negligence, he acts at his own risk and must suffer the consequences. *Abernethy v. Van Buren Township*, 52 Mich. 383. Such was the case here, as disclosed by the evidence on the part of the plaintiff, and it would be unjust to hold the defendant liable for an injury caused by the reckless driving of the plaintiff's servant.

2d. The burden of proof was on the plaintiff to show that the city had had reasonable time and opportunity, after the street became unsafe and unfit for travel, to put it in a proper condition for use, and that it had not used reasonable diligence to do so.

There was no attempt to show that any officer of the city had any knowledge or notice of the condition of the street. Nor does the evidence disclose at what time previous to the accident the street became unsafe or unfit for travel. What the evidence did show was that there were several loose cobble-stones in the travelled part of the street. Some of the witnesses testify in a general way that they were all over the street; but those who particularized said there were six to eight where the horse was hurt scattered around, and from twenty to two dozen in the street between Sheldon and Division streets. Mr. Bissell's coachman, who was a witness for plaintiff, stated that he had driven a carriage over this portion of the street almost every day for a long time previous to the accident and afterward. Other witnesses stated the street was used for heavy wagons.

I am inclined to think with the judge of the Superior Court that the proof failed to show that the condition in which the street was brought it within the statute rendering the city liable as for a defective highway. The proof showed that the horse was injured by stepping upon a single stone. The existence of other stones in the street had nothing to do with the injury. If the city is liable, it is so because it neglected to remove the single stone which was

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stepped upon; and if liable in this case, every city and township is liable for a defective highway in which a single stone chances to be in the travelled part of the way, in case injury is occasioned by a horse accidentally stepping thereon. I am not prepared to extend the statutory liability to such cases, and I think the judge of the Superior Court was correct in so holding.

The judgment should be affirmed.

Judgment affirmed.

COOLEY, C. J. I agree on the last point above stated.

CAMPBELL, J. Plaintiff sued the city of Grand Rapids for the value of a horse whose leg was broken by stepping on a loose cobble-stone in one of the streets. The court below held no cause of action was made out, and directed a verdict for defendant.

There was contradictory testimony, but plaintiff is entitled to claim that if there was evidence enough to make out a case, it was for the jury and not for the court to pass upon its truth. The question is therefore whether there was testimony showing such a condition of the street in question as would put the city in fault for allowing it to continue.

The testimony for plaintiff tended to show that Cherry street, where the accident happened, was at that place on a descending grade which began to descend or increased in descent a short distance above the place in question, and that scattered over this vicinity were a considerable number of loose cobble-stones of various sizes; that the street at this point was according to some testimony lower than the gutters at the sides, and according to most of it lower than the crosswalk above, and the stones extended across the travelled part of the highway, and were in the way of horses passing over it.

There was also testimony tending to show that from the turn of the hill just above the stones were not readily noticeable to persons driving over the brow of the slope and down the street to this point, and there was also evidence, although conflicting, that there had been habitual neglect to keep loose stones raked off from this part of the way for a considerable time, and that this condition was notorious.

Some witnesses familiar with the street testified that it was in bad condition and dangerous for horses. This testimony the court

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struck out on the final charge, on the ground that the jury alone could form opinions, and that witnesses could only describe facts which they were to pass upon. The court also held that every one who passed over the road was bound to see the obstructions and avoid them, and that a failure to do so was negligence which would defeat a right of action.

There was testimony which, if believed, indicated that the road was made dangerous to horses by these loose stones, and enough for the jury to act upon. And it was not improper to allow those persons who were familiar with the road to say whether or not it was in bad condition. All intelligent persons in the habit of using teams, or seeing them used, are capable of forming some judgment about the condition of highways, and it is not possible by mere verbal description to enable a jury to see the exact condition. In all such cases the opinions and the facts on which they are based, so far as the witness can give them, form a safe basis for a jury to act upon. Where, as in this case, the city officials and the other witnesses differ in their descriptions, the jury can use its own judgment in deciding between them.

It cannot be held as matter of law that every one who runs over a stone in a highway in the day-time is negligent. Every-day experience shows that such things do not necessarily strike the eye of persons driving along the road, and in this case there was testimony to the effect that persons going over the hill and down the road would not be certain or likely to notice them so as to drive safely among them. The jury may or may not have thought there was negligence here, and they should have been allowed to pass upon it. There are many cases in the books where recovery has been had for such obstructions. We are not at liberty to form or express opinions upon the facts. But there was enough to go to the jury on all the elements of the action.

The judgment should be reversed and a new trial granted.

SHERWOOD, J., concurred; COOLEY, C. J.: I do not concur.

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**FIRST NATIONAL BANK OF DETROIT v. BARNUM WIRE AND
IRON WORKS.**

(58 Mich. 124.)

Set-off — individual claim against trust claim.

Where a corporation put money in the hands of its general agent, as trustee, for safe-keeping and disbursement in the business, and afterward made a general assignment for creditors, *held*, that he could not offset a debt due him from the corporation.

THE opinion states the case.

Moore & Canfield, for receiver.

Otto Kirchner, for respondent appellant.

CHAMPLIN, J. Proceedings were instituted by the complainants in the Circuit Court for the county of Wayne, in chancery, to carry into effect a common-law assignment made by the E. T. Barnum Wire and Iron Works, in which proceedings Abram L. Stebbins has been appointed receiver. The receiver filed his petition in the cause to compel Charles Bewick to deliver to him the sum of \$11,900, which the petitioner claims as the assets of the assignor in the possession of said Bewick.

The Wire and Iron Works is a corporation organized under chapter 1 of act No. 187, Laws 1875 (How. Stat., p. 1051). It provides (section 6) that the business of the corporation shall be managed by a board of directors, and (section 8) that its officers shall consist of a president, a vice-president, a secretary and a treasurer, and "such other officers as the by-laws of the corporation shall prescribe." The by-laws of the corporation (article 5, title Officers") do not provide for any officers in addition to those named in the constituting act. They do however provide (article 6, title "President") that in addition to the usual duties, the president shall "act as general manager, and shall have full authority and supervision over the active business affairs of the company, and its officers and employees." During all the time covered by the transaction in litigation, Mr. E. T. Barnum was both the president and treasurer of the works. For some time the works had been in

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straitened circumstances. It was represented to Mr. Bewick that they were caused by over-manufacturing, and that a loan of ready money would tide the concern over its difficulties. Relying upon these representations, he advanced to it a large sum of money upon its note, dated June 16, 1884, for \$26,166.67, payable on demand. It remains wholly unpaid, except the sum of \$7,333.33 indorsed thereon.

The respondent Bewick is a stockholder in the corporation. In or about May last he was elected a director, and continues to hold that office. Up to July 3d the office of business manager or general manager was filled by E. T. Barnum. On that day Mr. Barnum resigned, and Bewick was chosen general manager in his place. He is still the business manager, having never resigned the office. At or about the time Bewick entered upon the duties of general manager the company became financially embarrassed and insolvent. On the 28th day of July the works made an assignment for the benefit of creditors. In the interval, fearing garnishment of its bank accounts with the First and Merchants and Manufacturers' National Banks of Detroit, it ceased its deposits with them, and it was arranged by the directors, or with their consent, that its moneys should be placed in the hands of Mr. Bewick, as trustee, instead of being deposited with said banks. He gave his receipts for the money, four in number, the first receipt bearing date July 10th, 1884, and the last July 28th of the same year; aggregating in amount \$14,300. One of the receipts is signed "Charles Bewick," simply, and all the others are signed "Charles Bewick, Trustee." These funds were deposited by Mr. Bewick with the German-American Bank in the name of "Charles Bewick, Trustee." This was done for the purpose of keeping them separate from other funds which he had on deposit in that bank. He arranged that any money which the corporation might need to use in the course of its business should be paid out of the money received by him, and for this purpose he signed blank checks by the name of "Charles Bewick, Trustee," which he left with Mr. Deacon, the book-keeper of the corporation, with directions to fill up and use as needed. Twenty-four hundred dollars were thus used previous to the assignment, leaving in his hands \$11,900.

On the same day upon which the last money (being \$1,500) was placed in Mr. Bewick's hands as trustee, the corporation made a general assignment for the benefit of its creditors. There had been

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talk previous to this of their closing down, and Mr. Bewick, as manager, had given direction to the several foremen to close down on that day. He had caused an inventory to be taken, and had formed an opinion that the assets of the corporation would not pay over fifty cents on the dollar of its liabilities. An inventory was prepared, to be filed in accordance with the statute, after the assignment was made, concerning which the record contains the following:

“It is stipulated and agreed that with the assignment of the said defendant, the E. T. Barnum Wire and Iron Works, there was filed an inventory, a part of which is in the words and figures following, to-wit:

ASSETS.

Cash on hand.....	\$ 612 72
in First National Bank of Detroit.....	1,163 88
in M. & M. National Bank.....	24 23
in hands of C. Bewick.....	11,900 00
	<u>\$13,710 83</u>

It is agreed that there is annexed to the said inventory the following affidavit:

State of Michigan, County of Wayne—ss.: Charles Bewick, of said county, being duly sworn, says that he is the general manager of the E. T. Barnum Wire and Iron Works, in whose behalf he makes this affidavit, and that the annexed and foregoing inventory of the assigned property of the said E. T. Barnum Wire and Iron Works and list of creditors are full and true, to the best of his knowledge, information and belief.

[Signed]

CHARLES BEWICK, General Manager.

Subscribed and sworn to before me this 7th day of August, A. D. 1884.

WILLIS G. CLARK,

Notary Public in and for Wayne County, Michigan.

The above inventory was filed on the 7th day of August, 1884, in the office of the county clerk for the county of Wayne.”

The testimony respecting Mr. Bewick's knowledge of what the inventory contained is conflicting. He testifies that he was not aware that the item of moneys in his hands was contained therein. and that he was advised that his verification was merely a formal

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matter. On the other hand, a witness who was present testifies that Mr. Ferry and Mr. Bewick made a careful examination of the inventory, and in some instances compared it with the books, and that this item of \$11,900 was spoken of at that time. Mr. Ferry was not called.

Afterward at the suit of various creditors, Mr. Stebbins, the appellee, was appointed receiver of the works. He made a demand upon Mr. Bewick for the sum last named, which was refused upon the ground that the indebtedness of the works upon its note to Mr. Bewick was a legal set-off against the receiver's claim against him. The court below, on the receiver's petition, made an order directing Mr. Bewick to pay the money to the receiver. From that order Mr. Bewick appeals.

The only question presented by the record is whether the indebtedness of the works on the note may be set off against the moneys so deposited by the works with Mr. Bewick.

It is not claimed on behalf of the petitioner that there was any fraud committed by the arrangement under which Mr. Bewick received the money. It was made at a time when it was supposed that by keeping control of its means the corporation would be able to continue business and pay its indebtedness. Yet in view of the facts it cannot be doubted that the object was to conceal its funds, and place them beyond the reach of creditors who might attempt to collect their debts by proceedings in garnishment. This the law does not condemn unless such action is taken with the intent to hinder, delay or defraud creditors. No such intent is manifest in this case. There is no authority shown from the board of directors authorizing respondent to apply the money placed in his hands to the payment of the note held by him. The circumstances repel any such inference, and he does not claim that he was authorized by the board to make such appropriation. The case does not therefore come within the range of those decisions where the directors of a failing corporation have preferred one of their number to the exclusion or detriment of other creditors.

Neither is it of any importance that Mr. Bewick was a stockholder and director of the corporation, except so far as those facts may bear upon the good faith of the transaction. The money was not placed in his hands because he was a stockholder, neither did he receive it in his official capacity as director; but it was placed in his hands as a depositary in trust; to use the words of Mr. Be-

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wick, "it was there kept in my charge for safe-keeping;" and his right to retain it to offset the corporation's indebtedness to him must be determined by the same principles which would be applied to any other creditor receiving like funds in trust, under the same circumstances, and with the same knowledge of the affairs of the corporation. In this equitable proceeding the same principles relating to the right of set-off will be applied as are applied in proceedings at law; and if at law, in a suit to enforce the payment of this money, he would be entitled to offset his note, he will be permitted to do the same here. 2 Story Eq. Jur., § 1437.

This leads us to inquire in what relation he stands to the corporation with reference to the \$11,900. If it was deposited with him the same as if he was a banker, with the right to use this money in his own business, or for any purpose he chose, as bankers have in case of a general deposit, there can be no doubt that the relation between him and the corporation was that simply of debtor and creditor, and he would have the right of offsetting his note against the demand for this money. If on the other hand, the transaction was such that he is to be considered the bailee of the corporation with respect to this money, and it could legitimately be applied only to the uses and purposes of the corporation under the trust imposed, then he is not a creditor of the corporation with respect to this money. In the latter case, the money being held in a different right than the money due to him on the note, it cannot be offset against either at law or in equity. The debts would not be mutual; neither would they be debts accruing in the same right. And although debts accruing in different rights may under special circumstances, where the proof is clear and the equity very strong, be set off, yet there is nothing in the facts and circumstances of this case to bring it within the exception. He claims that the money for which the note was given was obtained by assurances and representations made by the president and general manager. that although the corporation was in straitened circumstances and in need of money, yet the corporation was entirely solvent and was doing business at a profit, and only needed this money for a short time to tide it over until sales and collections could be made; which representations he claims were false, but upon the faith of which and relying upon their truth, he loaned them the money.

These facts do not create such an equity as would entitle respondent to hold the money as an offset. He was a director in the cor-

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poration, and it was his duty to know its financial standing, and it is to be presumed that other creditors who did not stand in official relation and had no opportunity or means of judging of the financial condition of the corporation trusted the concern upon the faith of its being solvent, whose equities, at least, are equal to respondent's.

The controlling facts are that the money was received by him as trustee. The trust was that he should keep it safe, and use it in the business affairs of the corporation. There is no analogy between these facts and that of a banker and his depositor. The banker who receives a general deposit from his customer undertakes, in consideration of the loan of the money and the right to use it as he pleases, to refund the same amount at one time or in parcels, as shall suit the convenience of the depositor; and the depositor is at liberty to draw his check for such amounts upon the banker, which it is the banker's duty to pay. This was not the transaction between these parties. Here the money was placed in Bewick's possession for safe-keeping, to be used as the business, not of Bewick, but as the corporation required; not to be drawn upon by the check of the corporation, but to be applied by Bewick in accordance with the terms of the trust. It needs no argument to show that any remaining money not so used and applied remained the money of the corporation. It did not, in placing it in Bewick's hands, part with the title to the money. There is no fact or circumstance which indicates such design. On the contrary, it regarded the money as its property, embraced in its inventory as assets of the corporation, and the correctness of this inventory is verified by the affidavit of the respondent.

These facts distinguish the case from *Scammon v. Kimball*, 92 U. S. 362, cited by counsel for respondent as supporting his claim of set-off. There the facts showed that Scammon, who was a private banker, received the funds of the insurance company of which Kimball was assignee, as general deposits, paid interest on them, and they were drawn out by checks of the insurance company as suited its convenience. The company was also indebted to him for losses by fire which it had insured against. The court held that these were mutual debts, which might be offset. The insurance company also held his notes given for stock for which he had subscribed and had not paid, and the court held that these notes could not be set off against such losses, for the reason that equity

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regards the capital stock and property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue such property into whosoever possession the same may be transferred, unless it has passed into the hands of a *bona fide* purchaser. The principle there laid down would prevent the money in question being applied or held as a set-off against the note of the corporation due Bewick, for the reason that at the time of the assignment the title of the money was in the corporation and passed to the assignee, and constituted a trust fund for the payment of the corporation debts *pro rata*. With respect to this money the respondent occupies no better position than he would if he had obtained possession of some of the machinery or manufactured articles belonging to the corporation and sought to retain them to satisfy his debt. *Key v. Flint*, 8 Taunt. 21; *Buchanan v. Findlay*, 9 B. & C. 738.

The order appealed from is affirmed with costs.

The other justices concurred.

MERKLE V. TOWNSHIP OF BENNINGTON.

(58 Mich. 154.)

Evidence — declarations — res gesta.

The declarations of an injured person to a physician as to the cause and circumstances of the injury are not admissible if not made until he has been removed and the physician has been called.*

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

S. F. Smith and *Wm. M. Kilpatrick*, for appellant.

Hugh McCurdy and *Gilbert R. Lyon*, for appellee.

COOLEY, C. J. The action in this case was instituted to recover damages for the death of the plaintiff's intestate, caused, as is claimed, by a bridge being out of repair on a highway in the defendant township. It was brought under the statute of 1848 (Sess. L.,

* See note, 47 Am. Rep. 52; also 53 Am. Rep. 864, 838.

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p. 31), as amended in 1873 (Pub. Acts, p. 127; How Stat., §§ 8313, 8314), which is a general statute, and in its first section provides that "whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." The plaintiff recovered judgment in the court below, and the defendant alleges error.

[Omitting other points.]

The plaintiff also produced William Hume as a witness, who testified that on July 5, 1881, he was called as a physician to see Mr. Merkle at Mrs. Cook's house, twenty or thirty rods from the bridge; that he found him in quite a good deal of agony, and on examination found that he had received a severe injury to the back and in the region of the kidneys. Witness made up his mind then that Merkle was seriously injured internally and would probably not recover. He asked Merkle to narrate "how the accident occurred, and he said that when he was driving over the bridge, as the horses got upon the plank, he said it was bowing, that both ends had over the end a 2x4 scantling that laid along the edge to hold the plank down. He said as the right horse stepped upon that plank the other end flew up, or the off horse, and scared one of the horses and he jumped, and as he jumped he made a severe lunge and the plank raised up under him and the whiffletree broke and the tongue came down, so it just struck the last plank on the bridge and that threw the tongue to the right and the horses ran and the tongue ran into the ground and he was thrown on a pile of stones and he didn't know any more until he found himself in Mrs. Cook's."

This evidence was received under exception by the defense, and its reception is one of the errors now relied upon. For the plaintiff it is claimed that these statements of the intestate were admissible as part of the *res gestæ*, and several cases are referred to as authority.

One of these cases is *Insurance Co. v. Mosley*, 8 Wall. 397. In that case the question at issue was whether the decedent had died

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in consequence of an accidental falling down stairs in the night. His widow was permitted to testify that he got up in the night and went down stairs; and when he came back he said he had fallen down the back stairs and almost killed himself; that he had hit and hurt the back of his head in falling, and he complained of his head and appeared faint and vomited. She was up with him all night, and he appeared in great pain. These declarations were held to be properly thus proved, on the ground that they were of the nature of *res gestæ*, and substantially contemporaneous with the main fact in issue.

Jordan v. Commonwealth, 25 Grat. 943, is another of the cases relied upon. There the question was one of identity of parties who had robbed a woman. The prosecution was allowed to prove that within a few minutes of the robbery the woman gave a description of the robbers to the witness, and that the latter pursued after the parties and caught the respondent, who corresponded to the description which had been given to him of one of the robbers. It was very properly held that what the woman thus promptly said was part of the *res gestæ*. Similar to this in the promptitude with which the declarations followed the criminal act is *People v. Vernon*, 35 Cal. 49, where they were also held admissible. *Burns v. State*, 61 Ga. 192, is to the same effect, but it appears to have been decided upon a section of the Code.

In the case of *Waldele v. Railroad Co.*, 29 Hun, 35, the time which had elapsed after an alleged injury by a railroad train was twenty or twenty-five minutes, and a witness was permitted to testify that the party told him he got hit; that there was a long train, and he stood waiting for it to go, and an engine followed and struck him. This case may be considered authority for admitting the declarations of Merkle that his injury had come from an accident at the bridge, but it scarcely goes further.

The cases of *Driscoll v. People*, 47 Mich. 413; *Stewart v. Brown*, 48 Mich. 383; *People v. Simpson*, 48 Mich. 474; and *Brownell v. Railroad Co.*, 47 Mo. 239, are scarcely relevant to this. They were well decided, whether this case should be ruled one way or the other.

In this case the point chiefly in dispute was whether at the time the bridge was out of repair. There was strong evidence both ways, and it was very important to the plaintiff that she should corroborate as much as possible the evidence of the young daughter. It

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was for this purpose rather than to show the general fact of injury and the time and place, that the declarations of Merkle were important. But these declarations were not made on the spot and spontaneously; they were not strictly or even substantially contemporaneous; but they were made after he had been taken to Mrs. Cook's and a physician had been sent for and procured. They were then made as a narrative of a past event. One very good reason for excluding such narratives is that the party has had time to deliberate and shape them in his own interest, and may be under strong temptation to do so. They are therefore subject to all the suspicions which attend declarations made by a party in his own interest at any time.

The case of *O'Connor v. Railroad Co.*, 27 Minn. 173, which was also relied upon, is much like that of *Sisson v. Railroad Co.*, 14 Mich. 497, and was decided, so far as this point is concerned, in the same way. It has no relevancy, as we think, here.

In this case, after Merkle had been injured by an accident at the bridge, as it is not disputed that he was, it was for his interest, if he could do so, to fix the responsibility for the injury upon the township. To do this, he must show the bridge to have been out of repair; and it is not necessary to infer a dishonest purpose in his mind to render his evidence unreliable. All questions of doubt under such circumstances would naturally be looked upon with a biased mind, and the longer the time allowed for deliberation, the greater would be the danger that the utterances would be unreliable. But after such lapse of time as appeared in this case, the declarations cannot with any propriety be considered part of the *res gestæ* any more than if made the next day or the next year. The affair was all over when Merkle had been taken to Mrs. Cook's; he had been removed from the scene of injury; the surroundings were all changed; the time for exclamation or outcry was passed, and nothing for the present remained to be done but to care for the injured man, leaving investigation into the cause of injury to some more favorable time in the future. The statements made by Merkle to his physician were proper enough as between man and man, but they had no legal value and were therefore erroneously admitted.

The defense, in attempting to meet the case of the plaintiff as to the bridge being out of repair, called Conrad Dench as a witness and proved by him that he crossed the bridge within the thirty

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days preceding the time of injury. He was then asked "Did you notice the planking?" and replied, "When I went across it was all right." The answer on motion was stricken out. The ruling is now supported in argument on the grounds — first, that the answer was not responsive to the question; and second, it was an expression of opinion, and for that reason was not proper. The objection that an answer was not responsive, is one to be made by the party who puts the question, not by his antagonist. If the answer is in itself proper evidence, the party who is examining the witness has a right to take and retain it if he chooses to do so. His doing this merely saves him the trouble of putting another question to draw it out.

But in this case it is only on a technical construction that the answer could be held not responsive. The witness was fairly notified by the question put that the purpose was to prove by him the condition of the planking as he found it, and he answered at once that the planking was all right. And in so far as this answer can be considered the expression of an opinion, we do not think the cases of *Stange v. Wilson*, 17 Mich. 342; *Ryerson v. Abington*, 102 Mass. 526, and *Kelley v. Fond du Lac*, 31 Wis. 179, which are cited in support of the ruling, are in point. The first two certainly are not, and the third only decides that witnesses who are not experts cannot be allowed to testify to their opinions whether a certain bridge is or is not safe for travel. That was not the question to which Dench was called. One side affirmed, and the other denied, that a certain plank was warped loose, liable to tip up when a horse trod upon it, etc. When Dench, called as a witness on this controversy, said "The planking was all right," no reasonable man could have understood him as meaning that a loose plank, liable to tip up when trodden upon, was safe or right, but the obvious meaning of his answer was that the planking was right in the sense of not being thus warped, loose, etc., and if any one thought the reply uncertain and ambiguous, the true meaning should have been made clear by further questions and answers, instead of striking this answer out.

The submission of the case to the jury seems in the main to have been careful and accurate, but doubtless by inadvertence the judge apparently put upon the defense a burden which belonged to the plaintiff when he told the jury that "the fright of the team is no defense to this action unless you find it was caused by something else than the defect in the bridge." The important question was

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whether the defect in the bridge caused the fright; the affirmative fact on that point was to be shown, not the negative. And the affirmative was upon the plaintiff.

Many other errors are assigned and have been examined; but we have discussed those we sustain and find none of the others of sufficient interest to require an extension of the opinion.

A new trial must be ordered.

CAMPBELL and SHERWOOD, JJ., concurred.

CLINTON V. ROOT.

(53 Mich. 122.)

Evidence — expert opinions.

Whether it is negligent not to put out a plank for passengers to embark on a steamboat, and to try to embark without a plank, are not subjects of expert opinion.*

ACTION for personal injury by negligence. The opinion states the case. The defendant had judgment below.

Holden & Harris, for appellant, cited as to liability, *Smith v. Lond. & St. Kath. Dock Co.*, L. R., 3 O. B. 326.

W. A. Clark, for appellee.

CAMPBELL, J. Plaintiff sued defendant as owner of the steamer Wellington R. Burt for an injury received in boarding the vessel at Zilwaukee. Immediately on the arrival of the steamer at the dock, the majority of those waiting got on board, and among them plaintiff, who is a lady of forty-eight years old, jumped from the dock to the gangway, and fell and broke her leg. The distance was not far from twenty inches, and the fall seems to have been occasioned by the motion of the boat. The steamer was making her last return trip up the river, and plaintiff who had gone down to Zilwaukee earlier in the day, was on her way home again. There was much and directly conflicting testimony upon the point whether the steamer was moored and her gang-plank put out at all or sea-

* See 49 Am. Rep. 544.

sonably, and the same direct conflict on the question whether the clerk of the boat did or did not hurry up the passengers on the dock and order them aboard without waiting for the plank. A case has seldom appeared in this court where there was so direct a conflict between apparently reputable witnesses. The jury, under the charge, found a general verdict for defendant, and made some special findings. To the question whether it was practicable to put out a gang-plank before the plaintiff leaped from the dock upon the boat, they made no answer.

They found that the boat was made fast and a gang-plank put out as soon as could reasonably be done.

They answered the inquiry whether the boat had ceased to move forward when plaintiff jumped from the dock to the deck, that they were in doubt as to the forward movement.

The testimony was not conflicting on the fact that there was movement in some direction at that time.

The finding that the gang-plank was seasonably put out removes from the case that element of neglect, and leaves to be considered such questions as arose on admission and rejection of evidence, and upon charges and omissions to charge.

There was no finding of the jury that plaintiff did not act upon the orders or assurances of the officers of the boat in getting on board as she did, and this was the principal question presented as the record stands. Connected with it are the instructions given or refused by the court upon contributory negligence. These points, which are dwelt upon by the brief for plaintiff, are not noticed by counsel for defendant. They are important.

Much testimony was introduced bearing upon the danger of failing to supply or use a gang-plank, and the rulings were not entirely harmonious. Captain De Land, who was shown to be a person of experience, while allowed to answer some questions as to danger at that particular time and place, was prevented from answering other quite as proper questions as to general usage and duty. These were not foreign to the inquiry, for it may depend very much on general usage whether the officers and hands of steamers will be expected to provide particular facilities. He was also allowed, under objection, to answer this question: "If you should regard it as carelessness in not putting out the gang-plank, is it not equally careless her getting aboard without the gang-plank?" To this he gave a qualified answer, but one which may have had considerable

weight with the jury under the charge concerning contributory negligence.

Whether it was negligence in the steamer's crew not to put out the plank was held by the court in various rulings to be a question only answerable by experts. The ruling in that direction confined the range of experts within bounds which may have been too narrow. But there can be no doubt that the question was one determinable more or less as one of usage and experience. No such criterion can be applied to the action of ordinary persons under given circumstances. Ordinary care and prudence in common emergencies is a matter to be determined by the opinions of the jury, who are in need of no help from experts to decide it. It is often so plainly a matter of universal judgment that courts may act on it themselves and take it from the jury, although not in case of conflict. But to treat it as belonging to the same category with matters of marine usage and duty was misleading and erroneous. In the same connection Elijah Powers, a sailor of experience, and for years familiar with the custom in regard to taking passengers aboard steamers, and who saw what occurred, was not allowed to answer whether "as that boat was, could they be taken on safely?" or another similar question as to what was requisite for safety, — the exclusion being for want of evidence of sufficient knowledge. He certainly had testified to knowledge, and had shown an amount of experience which ought to have given it.

In view of some other instances of exclusion, it seems proper to refer to this subject further. The employment of river steamers in carrying passengers is not so exclusively a maritime business that knowledge of its methods and duties is presumably confined to sailors alone or to sailors employed on river steamers. Many, if not most of the persons, employed on board are such as under the maritime law would be classed as landsmen. A knowledge of the incidents of the business is attainable for many purposes by any kind of experience which gives facilities and creates habits of observation. Many of the inquiries in the present case, which the court confined to sailors, and on which the jury were told they must accept the views of sailors, were quite as open to the view of other observers.

But the very fact that no one without some adequate knowledge could be allowed to express an opinion upon the duty of the steamer's men to provide safe means of access, must be equally sig-

nificant in relieving inexperienced persons from a presumptive knowledge of the danger caused by the omission. The testimony in this case showed that it was a constant practice of persons seeking passage to do just as the plaintiff did, and if it could—as it evidently might—be regarded as dangerous, it was such an obviously frequent danger that it became a question of some importance in case whether adequate or reasonable precautions were used against it, and how far, with or without invitation from the officers, passengers could be deemed negligent in getting on board in that way where no obstacle existed.

Upon this question of contributory negligence, the charge leaned so strongly against plaintiff that it is not at all unlikely it determined the verdict. It seems to have been held that there was evidence of such apparent risk that the invitation to go on board, as plaintiff did, would not exonerate her from considerable responsibility. After drawing some distinctions between the duty resting on children and grown persons to disregard dangerous invitations and commands the court used this language: "If a person of ordinary care and prudence, of the age, intelligence and experience of this lady, would have hesitated—would have seen that there was danger and would have hesitated—or would have said, 'there is danger, and I will take the risk,' then there was contributory negligence on her part, and she could not recover. It is a question of fact for you to find. If you find that the defendant was seeking to make a proper landing there and did so; that these parties, before the defendant could make a proper landing, got aboard this boat, and this plaintiff went on board and was injured in consequence—she cannot recover." There were several repetitions of the duty of applying the rule of ordinary care, which taken alone would perhaps be unobjectionable, but when the whole charge is taken together, the force of an invitation to get on board, and the duty of plaintiff to refrain from doing so if dangerous, were not so dealt with as to give sufficient weight to the conditions of the case as presented.

Where passengers are at the appointed place for embarking; with no fences or gates to keep them back, they must generally have a right if they do so in good faith, to assume that no dangerous orders will be given, and that they may safely act on the directions of those whose legal duty it is to protect them from risk, and who are supposed to know what is safe. Some allowance must

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also be made for such conditions as stand in the way of full deliberation. It is applying too harsh a rule to hold that persons who have apparently but a few moments to decide between following the directions of the officers and losing their last chance of passage, should be held to be negligent in doing as they are invited to do, unless the danger is very obvious. The instruction complained of, which spoke of defendant's seeking to make a proper landing, did not include in the assumption the important element of knowledge or reason for belief of plaintiff that such attempt would be made. A knowledge of such purpose might make any act of impatience open to criticism, whereas a want of such knowledge, leaving every one where he or she must act on present appearances, would very much modify that responsibility as governed by the facts.

In our opinion the case was not so presented as to save plaintiff's rights from misconstruction.

The judgment must be reversed and a new trial granted.

Judgment reversed.

COOLEY, C. J., and SHERWOOD, J., concurred.

ATTORNEY-GENERAL V. BOARD OF COUNCILMEN OF DETROIT.

(38 Mich.

Constitutional law — political opinions as conditions of holding office — delegating power of choosing — interfering with local government.

A statute providing for the appointment of election inspectors in Detroit by a board to be appointed by the mayor and council, and to consist of two persons from each of the two leading political parties, is unconstitutional.

MANDAMUS. The opinion states the case.

Edwin F. Conely and Isaac Marston, for relator.

Fred. A. Baker and Ashley Pond, for respondents.

CAMPBELL, J. The attorney-general applies for a *mandamus* to compel the respondents to take action upon certain nominations made by the mayor of Detroit of four persons, two being Republicans and two being Democrats, to act as a "Board of Com-

missioners of Registration and Election" for the city of Detroit. Respondents refused to consider the nominations because they regarded the statute which provides for such board as unconstitutional and invalid. To an order to show cause they interpose that ground of defense. No other question is of much importance in the case.

The necessity of an immediate decision, in order to allow time for the action of the city authorities in season for the coming election, made it impossible for the court to do more than announce its determination, on rendering judgment in favor of respondents, as any oral statement in brief form of the grounds of their action would have been liable to some misapprehension. It was therefore thought best that the members of the court should express their views more formally in writing.

The statute in question purports to amend chapter 2 and some sections of chapter 3 of the charter of Detroit, as revised in 1883. Chapter 2, which refers to registration of voters, is entirely superseded by the present act, as is also so much of chapter 8 as provided for the choice of inspectors of election. The new statute undertakes to provide a board of commissioners to appoint ward registers and inspectors who are to perform the duties formerly imposed on the boards made up of aldermen and their appointees and of persons elected by the voters. The board thus provided for is required to be composed of four members holding office for four years, the first board being appointed for one, two, three and four years respectively, so that one vacancy shall be filled each year. They are to be resident electors of the city, and "two members thereof to be from each of the two leading political parties in the said city." They are required two weeks before the time fixed by law for the meeting of boards for the registration of voters, to appoint two qualified electors of each voting district, one "from each of two leading political parties in said city" to act as registrars and form a district board of registration. The various district boards sitting together are to constitute a city board of registration. The board of commissioners are to fill any district vacancies by persons of the same political party to which the absentee belongs.

The commissioners are also required to appoint for each voting district two inspectors, one from each of the two political parties "represented in the common council of said city," the electors choosing a third. Vacancies in any board of inspectors are to be

filled by *viva voce* vote of the electors, but each vacancy must be filled by a person of the same political party as the absentee. The commissioners also appoint the various clerks of election, but have no immediate part in the work of registration by action or supervision.

The statute makes a number of new provisions upon the subject of registration and election, which were more or less discussed on the argument, but which would only be important if the law were not held to be entirely invalid, as we deem it to be. These several provisions will not therefore be dwelt upon.

The invalidity of the statute was chiefly based, on the argument, upon the illegality of creating a board with such powers as those conferred by the statute, and required to be composed of equal numbers of two political parties appointed as such members and ineligible without such party connection. Relator insists that the legislature, under its power to pass laws "to preserve the purity of elections and guard against abuses of the elective franchise," has discretionary power over the methods, and that even if the partisan qualification is improper the court may treat it as not essential and sustain the commission by allowing the selection of its members without any such test. Neither of these grounds is tenable in our view of the Constitution.

In order to appreciate the bearing of the considerations presented on the case, it will be necessary to make some reference to the general elective system of the Constitution itself.

It is needless to explain that under that instrument the whole scheme of government, in every department, depends upon the action of the qualified voters in their election districts. All male citizens of lawful age, and some whose United States citizenship is incomplete, are entitled after a certain term of residence to vote in the township or ward in which they reside. Every vote, for any purpose whatever, is required to be cast in such township or ward. The only exception is in case of soldiers in the field during war. All legislation imposing restraints or conditions upon voting must conform to the other clauses and provisions of the Constitution. No part of that instrument can be allowed to over-ride or destroy any other part. It is also well settled that our State polity recognizes and perpetuates local government through various classes of municipal bodies whose essential character must be respected as fixed by usage and recognition when the Constitution was adopted. And

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any legislation for any purpose which disregards any of the fundamental and essential requisites of such bodies, has always been regarded as invalid and unconstitutional. There is nothing in the Constitution which permits the legislature, under the desire to purify elections, to impose any conditions which will destroy or seriously impede the enjoyment of the elective franchise.

And as the right of voting is the same everywhere, it is obvious that the conditions regulating the manner of exercising it must be the same in substance everywhere. The machinery of government differs in its details in cities, villages and townships, and of course it is unavoidable that there must be some differences in methods and officers, to administer the election laws. But it cannot be lawful to create substantial or serious differences in the fundamental rights of citizens in different localities, in the exercise of their voting franchises.

It is also a most important principle under our constitutional system, that no one shall be affected in any of his legal and political rights by reason of his opinions on political subjects or other matters of individual conscience. The political right to freedom of belief and expression is asserted in the most distinct way, and applies to every privilege which the Constitution confers. No one has ever supposed that any new condition could be added to those which the Constitution has imposed on the right of suffrage, beyond such as are necessary to guard against double voting or to prevent its exercise by those who are not legal voters. The only legitimate object of registration laws is to secure a correct list of actually qualified voters. Any attempt to inquire into the sentiments of voters is not only an abuse, but one which it is the chief purpose of the ballot system to prevent. The ballot is a constitutional method which cannot be changed, and its perpetuation means the security to vote without any inquisition into the voter's opinion of men or measures. And it would be entirely meaningless if the voter's choice of candidates for any office must be made from any particular party or number of parties. But the Constitution has made this more specific (although this was hardly necessary), by providing, after giving the form of an official oath, that "no other oath, declaration or test shall be required as a qualification for any office or public trust."

It is manifest that every important function of government comes under one or the other of these heads of office or public trust. The

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board of registration commissioners consists, under this statute, of persons holding permanent offices. The district registrars, clerks and inspectors perform functions connected with the most vital and important action of citizens in their capacity as choosers of the officers of government. The constitutional rule covers them all, literally as well as impliedly.

It was urged on the argument that if the term test can be held applicable to inquiries into party affiliation, it is equally applicable to those other qualifications often required for public service, such as education, scientific acquirements in surveyors and other specialists, legal knowledge in law officers, and the like. But this is not so. Not only is it evident from the other provisions in this clause that all of the exemptions referred to are such as would be applicable in all sorts of offices, but the use of the word test is especially significant because its recognized legal meaning in our constitutions is derived from the English Test Acts, all of which related to matters of opinion, and most of them to religious opinion. Such has been the general understanding of the framers of constitutions. If this were not so, and if the power of the legislature in imposing conditions of office is at the same time only restrained by express clauses applying in terms to officers and to no one else, it would not be difficult for any dominant party controlling the legislature to perpetuate its power until overthrown by revolution. But such discriminations are as repugnant to the rights of voters in selecting as to the rights of those chosen in assuming office, and this clause is but an additional assertion of a principle found in other parts of the Constitution, expressed or clearly implied.

In the case of *People v. Hurlbut*, 24 Mich. 44, it was not disputed by any of the judges who referred to the matter, that it would not be unlawful to confine the choice of officers to particular parties, although two of the judges thought that the provision in that particular case was capable of being eliminated from the statute. And it is claimed in the present case that the present law is declared and intended to be non-partisan, and that the board may be chosen without reference to this restriction of party membership.

It is altogether likely that the framers of the law were of opinion that the evils of partisan action and the temptation to carry it to abusive extremes would be lessened by requiring that one party should not monopolize the offices but that two should share them. No one can doubt the advantage of impartiality in public action.

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But parties, however powerful and unavoidable they may be and however inseparable from popular government, are not and cannot be recognized as having any legal authority as such. The law cannot regulate or fix their numbers, or compel or encourage adherence to them. Many good citizens form no permanent parties, and when elections are close the effort of each party is to detach votes from the friends of the other. Where there are two parties larger than any others, the success of either is very often gained by coalition with a third one. In local matters party allegiance is not uncommonly laid aside for the time being, so that it cannot be said that any party is represented in the election. However well meant such a statute as that before us may be, it distinctly makes party adhesion a condition of office, and not only so, but it puts all but the two favored parties beyond the possibility of representation, if the law is obeyed.

It is equally clear that this party representation is the essential purpose of the law, and that the other changes are merely subsidiary. There are some changes in detail, but the main purpose cannot be mistaken. The partisan qualifications are made emphatic in regard to all the offices. It is impossible for any candid person to read the act and believe that the real legislative design can be carried out by leaving the mayor and councilmen at liberty to choose commissioners from a single party, or for the commissioners to appoint registrars and inspectors without distinction of party at their pleasure. And it would need no great sagacity to see that if such unlimited power were vested in a body made up as this body might then be constituted, all of the old evils would remain, and would be made worse by the absence of any responsibility to the voters of the precincts.

In my judgment the creation of a board with such powers as are given to this board is quite as serious an infringement of the Constitution as the partisan clauses, and much more dangerous. This board is made by the statute the repository of some of the most important powers of government. It has the entire control, directly or indirectly, of the elections on which all the departments of government depend. It has the appointment of officers who can deprive any man of his vote at an election, if they see fit to do so, without any adequate means of redress to save it. While it is unavoidable that a voter's rights at an election must, in case of dispute, be disposed of summarily, it is all the more necessary that

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the tribunal which decides on so sacred a right should be made up in harmony with representative and popular institutions.

While boards are not uncommonly created for the more convenient management of the business interests of municipalities, it is a principle universally settled in our system that all officers and functionaries exercising powers of government and control over political action must derive their powers and office either from the people directly, or from the agents or representatives of the people. The officers of towns and cities have always been so created. The discretion of a political body or functionary cannot be delegated and sub-delegated indefinitely. Here the choice of ward officers is made, not by the people of the ward, nor by any one chosen by the people of the ward, nor by the chosen officers of the city, but by persons who are themselves appointees of a part of the city government. No doubt there are many ministerial powers which can be deputized. But a governing body cannot deputize others to perform its governing functions, and the legislature cannot authorize it to do so without destroying the character of the corporation which is required to be preserved. It has always been held in this State that the municipalities which can be created by our legislature must be such in substantial character as they have been heretofore known. Up to this time, and ever since elections were first held in Michigan, they have been not only localized in some municipal division, but regarded as municipal action and supervised and managed by municipal officers either directly elected or else appointed by those who have been elected. Such a board as this, which is in no sense a mere agency of the city, is foreign to our system. If it can be created in a city, it may be just as well created in a county or for the State. When the election ceases to be a municipal procedure, the whole foundation of municipal government drops out. And a municipality which is not managed by its own officers is not such a one as our Constitution recognizes.

As the defects which have led to a refusal of a *mandamus* in this case invalidate the whole law, there is no occasion to consider anything else. In my opinion either of them is fatal.

CHAMPLIN and SHERWOOD, JJ., concurred.

MORSE, C. J., concurring. The ostensible primary object of the law under consideration was to preserve the purity of elections and

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throw additional safeguards around the ballot-box. Such a law should be sustained, unless in plain violation of the letter or spirit of the Constitution. Every good citizen, regardless of political belief or party action, ought to and does desire that the right of suffrage shall be amply protected against hindrance or obstruction to the legal voter, as well as against the fraudulent exercise of the elective franchise. The security and permanency of good government also depend upon it. We can take judicial knowledge, I think, that political corruption exists, and that there has been, and is liable to be, a dishonest depositing and an unfair counting of ballots. There is no doubt but legislation is needed to protect and purify the exercise of this, one of the highest privileges of the citizen.

The constitutionality of this act, which is in the form of an amendment to the charter of the city of Detroit, was attacked upon the argument in this court upon four grounds, namely:

First. That it is in conflict with the provision of the Constitution that "no law shall embrace more than one object, which shall be expressed in its title."

Second. That it violates another provision of the Constitution, to-wit: "No law shall be revised, altered, or amended, by reference to its title only, but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length."

Third. The form of registration prescribed is not in harmony with the constitutional qualifications of electors in this State.

Fourth. The act is wholly void because of the political tests or qualifications of the registration and inspection officers.

I am not satisfied that the first two objections are tenable.

As to the third objection, while I believe the form prescribed not applicable to our election laws, and one that would do more harm than good, creating confusion instead of certainty, and having a tendency to hamper and perhaps to prevent the exercise of the elective privilege by the legal voter in certain cases, and therefore unconstitutional, yet under the rule uniformly applied to statutes, it would not defeat the operation of the remainder of the law, as I regard the form of registration rather as an incident to than as the main principle of the act.

The fourth objection to the law, it seems to me, is fatal. The act provides in substance that the board of councilmen of the city,

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upon the nomination of the mayor, shall appoint a board of commissioners of registration and election in and for the city of Detroit, who shall consist of four resident electors, and whose term of office shall be four years. This board of commissioners have placed wholly in their hands the appointment of the district boards of registration in every voting precinct in the city. They have also the absolute power of appointment of two of the three election inspectors in every voting district, leaving the electors the poor privilege of choosing the other upon the opening of the polls. Besides defining the powers and duties of said boards of commissioners, registration and election inspectors, the law prescribes the following qualifications of these officers as follows: *First.* "Said board" (of commissioners) "shall be strictly non-partisan in character, two members thereof to be from each of the two leading political parties in the said city." *Second.* "One of said registrars" (district board of registration) "to be from each of two leading political parties in said city." *Third.* "One inspector" (of elections) "so appointed to be from each of the two political parties represented in the common council of said city." The law also provides that if any vacancy shall occur in the district registrars or election inspectors such vacancy shall be filled from the same political party to which the absentee belongs.

Section 1, article VII of our Constitution prescribes the qualifications of electors. It contains no provision for a registration law; and such a law can only be sustained and upheld under section 6 of article VII of that instrument, which authorizes the legislature to pass laws "to preserve the purity of elections, and guard against abuses of the elective franchise." The legislature is utterly powerless to pass any act to hinder or abridge, in the exercise of the electoral right, any person who is an elector under the Constitution, except the manifest intent and operation of the law be to protect the legal voters from fraud and abuse of the elective franchise. If a registration law therefore is constitutional, it must be so drawn as by its terms to proscribe no man because of his political belief; and the officers whose duty it is to operate the machinery of registration and election, who sit in judgment upon the right of citizens to vote, cannot by law be restricted to any one or two political parties.

We must take judicial knowledge of the current undisputed history of our State and country, and act upon the assumption and

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the fact that there are to-day, at least in the State of Michigan and in the city of Detroit, four political parties, to-wit, republican, democratic, national or greenback, and union or prohibition. To confine the registration and election boards to men composed wholly of any one, two or three of these parties would be a plain violation of the spirit of our Constitution, and have a tendency to hamper and abridge the elective rights of those belonging to the political party or parties who by law would not and could not have any representation upon such boards. But such a law is also in direct conflict with the plain letter of the Constitution. Section 1, article XVIII, of that instrument, after prescribing the form of the official oath of members of the legislature and of all officers, executive and judicial, concludes as follows: "And no other oath, declaration or test shall be required as a qualification for any office or public trust."

In my opinion there can be no doubt but this law subjects the officers of registration and election in Detroit to a political test. If the two leading parties in that city be democratic and republican, then any citizen who cannot by reason of his political conscience ally himself with one or the other of these parties is debarred by law of the right of holding one of these offices. If the national and prohibition parties should be the two leading ones, then the republican or democrat would be ostracised. There can be in a true republican government no political or religious test in holding office, the political and religious liberty of the citizen being at the foundation of republican institutions. If this law had provided in express terms that these various boards should be equally divided between democrats and republicans, its repugnance to the Constitution would be plainly applicable to all. As it is, it accomplishes by indirect language the same result.

The opinion of Chief Justice CAMPBELL in *People v. Hurlbut*, 24 Mich. 90-92, correctly applies the principle that no person can be prevented from holding office because of his political opinions.

Suppose the legislature should enact a law that the school officers of any city or village in this State should be selected equally from the members of the two leading churches therein, making a religious test, would any one argue for a moment that such an act was constitutional? And certainly the right of the citizen to his political opinions is and should be as zealously guarded as his right to his religious belief.

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It is urged that the political proscription in this law is less than actually takes place without it; that those having the appointing power of registrars and inspectors under the old law do in Detroit, as a matter of fact, appoint all these officers from one party instead of two, thus precluding still more citizens from these places. In answer it can be said that this was an abuse of power not sanctioned by the law, but permitted, if at all, by its silence, while this act before us puts the seal and stamp of approval upon the very abuse it seeks to cure, and makes it a requisite for these officers to be partisans of a certain name or designation, thus making this evil of partisan appointment a permanent feature of our State polity. For if the legislature has power to require that these offices shall be filled by members of two parties only, it is competent to pass a law that they shall be holden only by the members of the leading party; and a partisan majority in the legislature might fix the political belief of every municipal officer in the State, taking from the people of the locality the right to have a government of a different political color than the legislature. The remedy is worse than the disease. It is not only political oppression, but a deprivation of a local self-government.

Suppose that in one or more election districts in the city of Detroit the nationals and prohibitionists combined were numerically stronger than the united republicans and democrats, though a minority in the whole city. Then, in these days of party coalition, it might be possible for the democrats and republicans controlling the boards of registration and election in the city, and in these wards and districts, to combine against the other two parties in such districts. In such a case there would be naturally the same incentive to and opportunity for frauds and abuses as if all the registrars and inspectors belonged to one party, and it is therefore doubtful if the present law would in all cases have the effect desired.

Suppose, further, the two leading parties in Detroit to be, as they actually are, democratic and republican. The plurality of these dominant parties over the third party might be so small and trifling in the entire city that in two-thirds or even three-quarters of the wards in the city the third party might have a plurality of votes over either, and yet have no representation except one inspector upon any of these boards, and therefore liable to be subject to the same evils that we now deplore.

Again, the inspectors must be of the same political shade as the two leading parties in the common council; and it would not be an unusual thing to have the leading parties in the city not the same as the leading parties in the common council.

The argument might be elaborated further, but it is useless. In any way we turn this law, and apply it to the common everyday occurrences in political life and action at our elections, the more clearly does it appear that this act can have no other effect than a disfranchisement of a large body of the people from holding these offices, simply because they are politically for the time being in the minority in the whole city. And it should be remembered that all are liable to bear its ostracism. The changes and fluctuations in votes constantly going on often place the majority at the last election in the minority in the next, and they who wield the club of power under this law to-day may feel themselves its weight to-morrow.

I fully agree in the views so ably expressed by Justice CAMPBELL in the leading opinion filed in this cause. The nearer the officers are to the people over whom they have control, the more easily and readily are reached the evils that result from political corruption, and the more speedy and certain the cure. The form of our State government presupposes that the people of each locality, each municipal district or political unit, are intelligent and virtuous enough to be fully capable of self-government, and the idea that the farther removed the election officers are from the people the less we encourage fraud and the more nearly we attain virtue at the ballot-box, is not in harmony with the theory and spirit of our institutions. It matters not what legislation has heretofore been adopted in the same road with this law; it is our duty to deal with the encroachment brought before us and to remove it.

The writ of *mandamus* must be denied.

McArthur v. City of Saginaw.

MCARTHUR V. CITY OF SAGINAW.

(38 Mich. 357.)

Municipal corporation — defect in street — pile of lumber at side.

A city street sixty-six feet wide was graded and kept in order for a space of thirty-one feet wide in the center. The sides had not been raised to that grade, and in one place a pile of lumber had been placed between the center part and the sidewalk. *Held*, that this did not constitute a violation of the statutory requirements to keep the streets "in good repair and in a condition reasonably safe and fit for travel." (*See note. p. 692.*)

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

Frank E. Emerick, Benton Hanchett and Albert Trask, for appellant.

Tarsney & Weadock, for appellee.

CAMPBELL, J. Plaintiff sued defendant for damage resulting from the death of Angus McArthur, claimed to have been caused by neglect to keep a city street in proper condition. On the 5th of December, 1883, deceased came across a bridge over the Saginaw river into Mackinaw street which is a continuation of the same way, and after crossing the rails of a railway which jolted his buggy so as to throw the seat out of place, his horse ran the buggy against a pile of lumber on the left side of the way, and deceased was thrown out and killed. The principal questions in the case related to whether defendant was guilty of any such neglect of duty as to render it culpable and responsible for the injury, and also whether deceased did not contribute by his own carelessness to the fatal result.

The case relied on by plaintiff was that deceased drove a spirited horse, but one fairly suitable for time and occasion, across the bridge and on the street, where he was frightened by an engine not very far away on the railroad; and that while he was moving rapidly forward, the pile of lumber was so far advanced into the street as to obstruct the free passage and thus cause the collision.

It appeared by the proofs that the street in question was from one outside boundary to the other about four rods, or sixty-six feet,

which is the standard for general highways. Thirty-one feet in the center had been graded and kept in order for travel, and was in good order at the time of the injury. The sides of the road were naturally low and had not been raised as the center graded portion had been. A sidewalk was laid from twelve to eighteen inches from the side of the street about six feet wide. Between that and the raised grade there was a ditch or gutter, and the lumber pile in question belonged to a factory abutting on the street, and reached above the ditch to the border of the graded part of the street. The jury found that the clear portion of the street was thirty-one feet wide, which covered, according to all the testimony, the entire graded portion.

The jury undoubtedly understood from the rulings of the court, and the question laid before them, that it was for them to decide how much of the street should be kept in condition for general travel, and they found that the entire street ought to be clear of obstructions, and it must be presumed they based their verdict for plaintiff on that idea. This was a palpable error, for there can be no doubt of the right of every city to determine what part of the nominal highway shall be devoted to the various purposes of passage, and upon such a subject the municipal discretion must prevail. It is common and entirely proper to set apart various parts of the space to sidewalks, gutters, trees and other suitable uses, and the plan adopted for such work is beyond judicial review, unless some distinct legal duty has been imposed and violated. *Larkin v. Saginaw County*, 11 Mich. 88; *Lansing v. Toolan*, 37 Mich. 152; *Toolan v. Lansing*, 38 Mich. 315; *Detroit v. Beckman*, 34 Mich. 125; s. c., 22 Am. Rep. 507. In both of the latter cases the accident out of which liability was claimed to have arisen was caused by the narrowness of culverts or planking, which left a ditch beside the covering open, and liable to be fallen into. In *Brevoort v. Detroit*, 24 Mich. 322, it was held that a city might leave no room for sidewalks if it saw fit, and also that it might terminate a given piece of paving before it reached a cross-street. Both of these would tend to produce inconvenience to travel, but it must rest with the city to determine for itself how far to extend its improvements. It is one of those discretionary powers necessary to good government, and the danger of abuse is not considered great enough to authorize its restriction.

Very few cities have a wider space than was left here for the

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travelled track of their streets. They are governed by considerations of expense and of private convenience in adjoining abutters, who in case of paving are generally made to bear the burden, and whose right to occupy the portion of the street not needed for the public, is generally favored to some extent, so far as the public convenience allows.

The lumber pile in the present case was not in the nature of an encroachment or defect, but was such an object as would, if unlawfully there, be an obstruction to the use of the way, if unlawful at all. *Grand Rapids v. Hughes*, 15 Mich. 54. So far as it prevented access to the premises of the owners, it was an evil that concerned them more directly than the public, and in the present case the deceased was not seeking access. It was not in the travelled track as improved by the city. If the city is liable in this action for negligence in leaving it there, that negligence consists in a failure to exercise its police power, in not having it removed, and not for failure to provide a sufficiently wide space for travel. If the city had put the lumber there and left it, some other considerations might be presented.

The liability of cities for injuries suffered in their streets is statutory. Our legislature has recognized this principle, and has not made them liable except under declared conditions. And in order to remove any possible doubt on the subject, the recent legislation, somewhat amending the details of the old law, has declared in so many words that no common-law liability shall exist. Pub. Acts, 1885, pp. 289, 291. The legislation has all been adopted in view of the decisions previously made on the subject, and is not open to serious ambiguity. The recent amendments have substituted the word "reasonable" in some cases for the word "good," and have indicated a purpose to prevent any responsibility for more vigilance than reasonable care requires.

The statute, as found in the former volumes, and included in How. Stat., §§ 1442-1446, indicates by its title its general scope. It is "An act for the collection of damages sustained by reason of defective public highways, streets, bridges, cross-walks and culverts." Section 1, which is the section governing this case, gives damages for personal injuries "by reason of neglect to keep such public highways or streets, and all bridges, cross-walks and culverts on the same in good repair, and in a condition reasonably safe and fit for travel." Section 4 imposes the duty "to keep them in

good repair, so that they shall be safe and convenient for public travel at all times," etc. And to do this it is provided that when the means now provided by law are not sufficient to enable the municipality to keep them "in good repair," authority shall exist to levy such additional sum, not exceeding five mills on the dollar, as will enable them to keep such streets, etc., "in good repair at all times."

We held in *Agnew v. Corunna*, 55 Mich. 428; s. c., 54 Am. Rep. 383, that the statutory liability was confined to such defects in streets as arose from their being out of repair, and did not cover objects forming no part of the streets, and not affecting their condition as ways properly kept in repair. We adhere to the opinion there expressed. The whole tenor of the statute is confined to the duties of cities and towns to construct their roads and repair them when out of order. The duty is the same in regard to all of these corporations. But it is manifest that their powers and means of preventing private parties from doing what may interfere with the safety or convenience of passers-by are not at all uniform or co-extensive. These private acts may consist of temporary as well as permanent nuisances, and may cause damage by fright as well as by physical violence, and neither cities nor towns could effectually prevent them in all cases without ruinous expense and very large means. But it is always possible, at moderate cost, to keep in repair such streets as are worked at all, and that work must be done by the municipality itself in most cases, and in all cases may be, if neglected, by others. As suggested in *Agnew v. Corunna*, it is constantly permitted to abutters on streets to occupy portions of the street for longer or shorter intervals with lumber and materials. How far this may safely be done without injury to the travelling facilities of the public must be largely a matter of discretion with the city. The unauthorized or excessive use of such privileges, when what is done does not create what is properly a defective way, is an abuse to be rectified under the police powers of the public, and does not belong to the making or repairing of ways. There is no more legal necessity for holding cities liable for the failure to enforce their police laws in favor of travellers, than in favor of many other citizens who suffer from nuisances or wrongs. The legislature seldom imposes responsibility to individuals for that kind of municipal negligence or misconduct.

McArthur v. City of Saginaw.

The case before us, upon the allegations, as well as proofs, makes out no corporate liability, and as it is clear that no recovery can be had, the minor questions need not be considered.

The judgment must be reversed and new trial granted, with costs of both courts.

Judgment reversed.

CHAMPLIN and SHERWOOD, JJ., concurred.

MORSE, C. J. I agree with my brethren in the conclusion reached by them in this case, mainly for two reasons. *First.* I think the undisputed facts show contributory negligence on the part of the plaintiff's intestate in driving in such a place a horse known to him to be wild and vicious and often unmanageable — a dangerous and unsafe animal — one that good horsemen could do nothing with when in the vicinity and hearing of escaping steam. The facts show that he had been repeatedly warned that the horse was liable to run away, and replied that he thought he could manage him, thus knowingly taking the risk of the very danger that was the primary cause of his death. *Second.* That the facts and the finding of the jury in their special verdict show the street, at the place where the lumber was piled and the accident happened, to have been clear and open for the width of thirty-one feet, which, to my mind, made it reasonably safe and fit for travel, notwithstanding the encroachment of the lumber pile.

I cannot however join in the proposition that a lumber pile or any other obstacle placed in the street by the city or by other persons, abutters or otherwise, may not be a defect in the highway under the statute. It is made the duty of cities as well as townships to keep all public highways and streets in good repair, so that they shall be safe and convenient at all times for public travel. Any thing which prevents or seriously endangers public travel is a defect in the highway. A pile of lumber extending across the street, entirely blocking the way or leaving only room for one vehicle to pass, would be as much a defect as an excavation in the bed of the road would be. The highway is wanting in that safety and fitness which the law requires for the facilities of the travelling public and is therefore defective. I cannot agree either in the idea that it makes a difference in the liability of the city if the obstacles in the street are put there without the authority or consent of the city. If abutters on the street, or other persons, put lumber or any

thing else in the street so as to impede necessary travel therein to such an extent as to make it dangerous to the public, and such obstructions remain there long enough to give the city notice of their presence and an injury should occur thereby, the city, in my opinion, would be equally liable as if the obstacles were placed there by its consent. The case of *Agnew v. Corunna*, 55 Mich. 428; s. c., 54 Am. Rep. 383, relates to an injury caused by a horse becoming frightened at a stone lying between the travelled part of the highway and the gutter, which had been there three or four days. This was considered by the court not a defect in the highway; and under the circumstances of the case it was not. But this decision cannot be made the foundation for the broad doctrine laid down in the opinion of the majority of the court in the case at bar. I do not deny the right of cities to allow temporary deposits in the street of lumber, timber, stones and other building materials for the convenience of those erecting or repairing buildings; but at the same time passageway must be left for the travelling public, whose rights are superior in the streets to those who are building alongside of them; and the streets cannot be left either by night or by day in such a condition as to be unsafe and unfit for travel to accommodate any body. Neither do I believe that the question how much and how long abutters can safely occupy the streets of a city with lumber, stone, coal, boxes, bales or other merchandise with injury to the facilities of the travelling public is a matter largely with the discretion of the city authorities, or that the unauthorized or excessive use of the privilege of so obstructing the streets is an abuse to be rectified under the police powers of the public, and does not belong to the making or repairing of ways. To my mind a necessary portion of the street or highway, sufficient to allow the free passage of vehicles, must be left clear and open, and if by reason of obstructions placed in the street by any one and there allowed to remain by the city after notice, the street is so narrowed or closed as to cause injury without the fault of one rightfully travelling therein, the city, in my opinion, is liable for the damage occasioned thereby, under the statute providing that streets and highways shall be kept in a condition reasonably safe and fit for travel.

NOTE BY THE REPORTER.—A town is not required to keep the margins of a highway in passable condition. *Perkins v. Inhabitants of Fayette*, 68 Me. 152; s. c., 28 Am. Rep. 84; *Mochler v. Shaftsbury*, 46 Vt. 580; s. c., 14 Am. Rep. 684; *City of Wellington v. Gregson*, 31 Kans. 99; s. c., 47 Am. Rep. 482.

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Dillon says this doctrine applies to cities. 2 Mun. Corp., § 1016. See also *Bassett v. City of St. Joseph*, 53 Mo. 290; s. c., 14 Am. Rep. 446; followed in *Craig v. City of Sedalia*, 63 Mo. 417.

In *Bacon v. City of Boston*, 3 Cush. 174, it was held that a sidewalk, six and a half feet wide, should be kept passable over its entire width.

See *Dubois v. City of Kingston*, *post*.

 NORTHWESTERN MANUFACTURING COMPANY V. WAYNE CIRCUIT JUDGE.

(58 Mich. 381.)

Constitutional law — oleomargarine — title of statute.

A statute, entitled "to prevent deception in the manufacture and sale of dairy products, and to preserve the public health," forbidding the manufacture and sale of any products in the semblance of butter, not made exclusively of milk or cream, and providing that the State shall purchase the machinery now used in such manufacture, and that the State auditors shall allow the sum judicially decreed to be paid therefor, is unconstitutional.*

MANDAMUS. The opinion states the case.

George W. Moore, for relator.

George F. Robison and *F. A. Baker*, for respondent.

CAMPBELL, J. Relator, being a corporation engaged in making oleomargarine and butterine in the city of Detroit, proceeded, on the taking effect of Act No. 186 of the Public Acts of 1885, to surrender to the sheriff of Wayne county its machinery and apparatus and outfit, and applied to respondent under section 9 of the statute, to have its value assessed by a jury, for the purpose of getting pay for it from the State. The judge refused the application on the ground that he did not consider the act valid. Application is made to us for a *mandamus* to compel him to proceed with the assessment. We intimated on the argument that we did not see our way clear to granting such a writ. The question depends on the legal efficacy of the statute.

Its title is "An act to prevent deception in the manufacture and

* See *People v. Marx* (99 N. Y. 377), 52 Am. Rep. 34; *Pierce v. State*, 63 Md. 592.

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sale of dairy products, and to preserve the public health." The first section punishes as guilty of a misdemeanor any person who shall manufacture, sell or ship "into this State oleomargarine or butterine or any articles in semblance of butter, and not the legitimate product of the dairy, and not made exclusively of milk or cream." Whether this would exclude butter made with salt, we do not find it necessary on this hearing to determine.

The second and third sections make it punishable as a misdemeanor, with heavy punishments not differing essentially from those in the first section, if any one shall render or manufacture out of "any animal fat, or animal or vegetable oils, not produced from unadulterated milk or cream from the same, any article or product in imitation or semblance of, or designed to take the place of natural butter," or "mix, compound with, or add to milk, cream or butter, any acids or other deleterious substance, or any animal fats, or animal or vegetable oils, not produced from milk or cream, with design or intent to render, make or produce any article or substance, or any human food, in imitation or semblance of natural butter," or sell, keep or offer for sale any such article, whether made here or elsewhere.

The fourth section begins with similar restrictions against doing any of these things with intent to sell them as genuine butter, but proceeds to make the possession of any of them conclusive evidence of such a design. The fifth and sixth contain some auxiliary provisions. The seventh seems to be designed to be a vindication of the statute and its purpose, and is in these words: "This act, and each section thereof, is declared to be enacted to prevent deception in the sale of dairy products, and to preserve the public health, which is endangered by the manufacture, sale or use of the articles or substances herein regulated or prohibited."

The eighth section repeals all laws inconsistent with this. The ninth section provides that all persons and companies having money or property invested in machinery, apparatus or stock used in connection with the manufacture of oleomargarine or any butter substitute, may surrender the property (except lands and buildings) to the sheriff, whereupon an inventory is to be made, and the owners are to commence a suit against the State in the Circuit Court of the county for its value, to be assessed by jury. The prosecuting attorney or attorney-general may appear and defend. The jury are to assess the value on evidence, and judgment is to be

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rendered against the State, and execution issued against the State, to be satisfied, as far as possible, by sale of the property, and the balance is required to be allowed by the State auditors, who are required to certify it to the auditor-general, who is required to issue his warrant on the treasurer, and the treasurer is required to pay it.

We are not called upon or qualified by any judicial knowledge which we possess to determine the merits or defects of the well-known substances which this statute was intended to suppress. We cannot, and the legislature cannot, decide with any authority whether they are of hygienic value or not. That they may be lawfully made and lawfully used, unless there is some valid law to the contrary, is beyond doubt. Whether the legislature can absolutely prevent their use or manufacture would be an interesting inquiry if this record presented it. But in our opinion it does not present it. The purpose of the statute, so far as it is lawful, must be determined by its title, and it is not competent to use one title and explain in the body of the act that it means something else. The constitutional rule requiring the title to contain the object of the act would be a farce if there were any power in the legislature to give new meanings to language. Section 7 is nothing more nor less than such an attempt at stretching words into an unnatural sense, and it is nugatory.

From first to last this statute is confined to what is an absolute and unqualified prohibition as a crime of any making or disposition of the articles within the State, as well as an attempted prohibition against persons in other States or foreign countries from making shipments hither. And section 9 is an attempt to make this State pay for the plant of any persons engaged in the manufacture, by subjecting it to a summary suit in a local court, subjecting its property to execution, and compelling the only constitutional body authorized to allow claims against the State to become the mere register of the Circuit Court's orders and transmit them to the auditor-general without inquiry. In this respect the statute is certainly remarkable.

It is plain that without this section the rest of the law could not have been passed. It must all stand or fall together. That such a peculiar provision should lurk under such a title as that of this act could never be expected by any one reading the title, and it is hardly credible that it could have been so understood by the great

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body of legislators. But foreign as it is, it is not much more so than the rest of the act.

The title covers nothing but deception in the "manufacture and sale of dairy products." If the addition of the words "and to preserve the public health" was meant to include any thing further, it would render the title double and thus avoid the whole statute for duplicity. It could only stand as indicating the reason for preventing the deception mentioned, and would, in that point of view, rather narrow than enlarge the purpose, by confining it to unwholesome articles, which all of these articles cannot possibly be.

All that could be done under such a title would be to prohibit and prevent the sale of such articles under false pretenses, as being pure dairy products. Such a prohibition would be no more than adding a new specified deception to the list of punishable false pretenses. And such a law would reach all the mischief aimed at by the title to this statute, and probably all of the mischief that really exists. There is no difficulty in reaching frauds and the use of unsound and dangerous products in other ways. But whatever authority the law-making power possesses, the Constitution will not permit legislature or citizens to be misled by embodying in any statute provisions which are not indicated by its title, to which all have a right to look for guidance in their searches after the law.

The peculiar phraseology of this act would seem to indicate that it was drawn up somewhere else, and it may possibly have been borrowed from some State where there is no requirement that titles shall be veracious indexes to legislation. Our own legislative bodies have not been trained in that way, and such is not our law.

It would be of no use to enter upon any discussion of the principles of public economy which were somewhat dwelt on upon the presentation of the case. Our proper functions confine us to legal questions.

The *mandamus* is refused.

The other justices concurred.

Columbus Sewer-Pipe Company v. Ganser.

COLUMBUS SEWER-PIPE COMPANY V. GANSER.

(58 Mich. 385.)

Guaranty — continuing — evidence.

A bond was executed reciting that the principal "has arranged and is about to purchase on credit" certain goods, and conditioned to be void if he shall pay for all goods purchased or that he may hereafter purchase, "according to the terms of purchase," otherwise to remain "in full force and effect for the amount of his said indebtedness, not exceeding \$3,000." *Held* (1), that parol evidence was competent to show the terms of the purchase and credit, and (2), that the guaranty was not continuing. (*See note, p. 701.*)

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

A. McDonell, for appellants.

Hatch & Cooley, for appellee.

SHERWOOD, J. This is an action of *assumpsit* brought by plaintiff to recover an amount claimed to be due to the company upon a certain bond executed by defendants to the plaintiff, on the 24th day of May, 1882, in which defendants Brunner and Cusson were sureties, the bond being a mercantile guaranty to secure to the plaintiff the purchase-price of sewer-pipe purchased by defendant Ganser, and which reads as follows:

"Know all men by these presents, that we, August Ganser, Joseph Cusson and Charles Brunner, of Bay City and Bay county, Michigan, are held and firmly bound unto the Columbus Sewer-pipe Company, a corporation duly organized under the laws of Ohio, of Columbus, Franklin county, Ohio, in the sum of three thousand (\$3,000) dollars, for the payment of which well and truly to be made we hereby jointly and severally bind ourselves. Signed, sealed and dated this 24th day of May, A. D. 1882.

The condition of this obligation is such, that whereas the said August Ganser has arranged and is about to purchase on credit sewer-pipe of said Columbus Sewer-pipe Company, now, if the said August Ganser shall well and truly pay said Columbus Sewer-pipe Company for all goods purchased, or that he may hereafter purchase of them according to the terms of purchase, then this obli-

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gation to be void, otherwise in full force and effect for the amount of his said indebtedness not exceeding \$3,000."

The declaration contains a special count upon the bond, also the common counts. The defendant, one of the sureties, appeared and pleaded the general issue. The record shows a trial by jury was had in the Bay Circuit and a judgment was rendered in favor of the plaintiff for \$1,773.52 damages. Defendant brings error.

The plaintiff claims the bond sued upon contains a continuing guaranty, subject to termination by notice from sureties. Counsel for defendant, on the other hand, insist that the same was limited to the purchases then made, or soon thereafter to be made, for the purposes of the work then about to be undertaken by Ganser, which was the purchase-price for a sufficient amount of pipe necessary to the completion of a sewer in First street in Bay City, and that the obligation of the sureties was therefore not a continuing one. The bond not being specific as to the length of time the liability of the sureties should continue, or as to the amount of material they intended to give their obligation for, the defendant, for the purpose of aiding the court in giving the proper construction to their contract in these particulars, proposed to show by Mr. Brunner, when he was upon the stand as a witness, the circumstances under which the sureties signed the bond, and for that purpose asked the witness the following question: "When you signed that bond what, if any thing, was said as to the time that the bond was to run?" This was objected to by plaintiff's counsel as incompetent and immaterial. Counsel for defendant then stated to the court: "I offer to show that at the time the bond was executed it was done with the express understanding between the parties that it was to be good for the sewer-pipe which was to be furnished for the First street sewer only. I propose to show that that was the condition upon which the bond was executed and delivered. I want to show the time for which it was to run." The court ruled, "that must be determined from the bond itself and the subsequent circumstances," and sustained the objection.

We think the court erred in this ruling. The testimony was competent for the purpose offered. Their responsibility was given to the plaintiff to secure it in a limited amount to aid Ganser in the purchase of materials necessary to the completion of a certain work, and if this were true it certainly would have aided the court and jury, not only in ascertaining the time the bond would run,

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but also the extent of the sureties' liability thereon, without in any manner changing or modifying the terms or condition of the bond. All contracts are to be construed in the light of the circumstances under which they are made, and this is no infringement of the rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument. Showing the circumstances under which the contract is made, and the subject-matter to which it relates, does no more than aid the court and jury to better understand the true sense in which the words are used and understood by the parties. If this were not permissible, great injustice would frequently be done after the most diligent effort and best consideration that possibly could be given to the subject.

[Minor point omitted.]

The important question in the case is raised by the defendants' fourth assignment of error, wherein the learned Circuit judge gave his construction of the contract between the parties. Upon this subject he charged the jury as follows: "Now I give you, gentlemen, as the legal construction of this instrument, that this was a continuing obligation of these parties to be responsible to this company, not exceeding \$3,000, for any indebtedness that might exist for sewer pipe purchased on the credit of Ganser until it should be revoked, until their obligation should be revoked by some notice to the company that they would be no longer responsible." We are not able to agree with this construction. A guarantor is not liable beyond the express terms of his contract. *Dustin v. Hodgen*, 47 Ill. 125; *Omaha Nat. Bank v. First Nat. Bank*, 59 Ill. 428. This guaranty belongs to the class known as commercial guaranties, which are frequently given without much care as to the language used, as they are usually written by business rather than legal men. Technical nicety should not therefore be applied in their construction. A wide latitude should be allowed in their interpretation, and in discovering the intention of the parties. The rights of sureties are always favored in the law, and persons standing in that relation in this class of obligations will not be held, unless an intention to bind themselves is clearly manifested. Their intentions are alone to govern when once ascertained, and when there is difficulty in giving a satisfactory interpretation of the language used it is the duty of the court to allow every circumstance that can be legitimately brought to bear upon the question to be made

use of in discovering the real purpose of the parties. The language used in the bond is not entirely free from doubt and uncertainty. A discussion of the authorities upon the point would aid but little in the solution of the questions involved, they are so conflicting. Similar questions, or the same perhaps, under similar circumstances, have been several times before the Supreme Court of this State. See *Farmers & Mechanics' Bank v. Kercheval*, 2 Mich. 505; *Gard v. Stevens*, 12 Mich. 292; *Jeudevine v. Rose*, 36 Mich. 54; *Crittenden v. Fiske*, 46 Mich. 70; s. c., 41 Am. Rep. 146. And while no general rule can be adopted which will apply to every case, and the construction to be given in each must necessarily depend largely upon varying circumstances, still we think we may safely say that "such effect must be given to the instrument as will best accord with the intention of the parties as manifested by its terms taken in connection with the subject-matter and the surrounding circumstances. 2 Pars. Cont. 21, note; *Boston Hat Manuf'g Co. v. Messinger*, 2 Pick. 228; *Dobbin v. Bradley*, 17 Wend. 424; *Lombard v. Fiske*, 24 Me. 64; *Garrett v. Wood*, 3 Kana. 232.

Applying this rule to the case before us, we are unable to hold the guaranty in question a continuing one. The amount for which it was given is clearly limited. The fact that moneys guaranteed to the plaintiff were to be for the purchase price of sewer pipe, and the amount of pipe then contemplated by the parties to be used would necessarily limit the extent of the indebtedness to be incurred by Ganser, and which was intended by the parties to be secured by the guaranty made; and when the defendants obligated themselves to "pay for all goods purchased, or that he [Ganser] may hereafter purchase, according to the terms of purchase," we think that no more than a single purchase was then contemplated by the parties; or if more than one purchase was in their minds, or anticipated by either of them, the amount of the several purchases was to be no more than was necessary for the completion of the contract for the building of First street sewer. This we think is a reasonable deduction from the language used by the parties in the instrument, read in the light of the circumstances under which it was made, appearing in the record, and in the admissible testimony offered in the case. It will be noticed that the bond states that Ganser had arranged for the credit, and was about to make the purchase at the time the guaranty of the sureties was executed; but

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what credit was to be given, and the terms of the purchase, as understood by the parties at that time were excluded from the jury. This testimony undoubtedly would have relieved the question of construction of the bond from all embarrassment, and as we have before said should have gone to the jury.

For this and the other errors noticed, the judgment must be reversed and a new trial granted. *Judgment reversed.*

MORSE, C. J., and CAMPBELL, J., concurred.

CHAMPLIN, J. When the minds of parties entering into a contract have met and the obligations assumed are evidenced by writing which is free from ambiguity, the intent of the parties, whether sureties or not, must be gathered from the instrument itself. Such a contract cannot be varied or altered by parol evidence, or by proof of surrounding circumstances. It is only when the contract is open to interpretation, and the true meaning obscure or uncertain, that the law favors sureties by giving to such contract a construction most favorable to them. There is no ambiguity in the bond declared on in this case. To my mind it plainly appears from the face of the writing that the undertaking was a continuing guaranty for all indebtedness arising from purchases thereafter made upon credit to the extent of \$3,000, and there is nothing in the writing that limits the credit to be given and guaranteed to a single purchase of \$3,000, or that shows any intent that the liability of the guarantors should cease when that amount in value of sewer pipe had been purchased upon credit. The guaranty is of the amount of the indebtedness not exceeding \$3,000. I think the Circuit judge was right upon this question. The sureties had a right under their contract to terminate their liability at any time as to any future sales, and I think it competent for them to give such notice to an agent of plaintiffs who had authority to sell pipe to their principal.

For rejecting the testimony offered to prove notice to the agent I concur in a reversal.

NOTE BY THE REPORTER.—In *Knowlton v. Hersey*, 76 Me. 345, K. wrote to H.: "The bearer of this letter, my son-in-law * * * wishes to place a stock of groceries in his provision and meat store in this place. To enable him to do this I am willing to be responsible to you for the amount of groceries he may order of you " *Held*, that this did not create a continuing liability. The

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court said: "It seems to us that the letter was not intended by the writer, and could not properly be understood by those to whom it was addressed, as creating a continuing liability. It expresses a willingness to aid Mr. Young in starting a new branch of business, but fails to express an intention to continue such aid in the future. In the language of the letter the aid which the writer proposes to render is to enable Mr. Young to place a stock of groceries in his provision and meat stores, not to replenish or keep such a stock good afterward; and that when the stock of groceries had been selected, and with the aid of Mr. Knowlton had been paid for, the latter's liability ended, and that two months after, other goods could not be sold to Mr. Young on Mr. Knowlton's credit, without the latter's consent, and a new promise to be accountable for them."

In *Pratt v. Matthews*, 24 Hun, 886, the defendants executed an instrument, whereby they agreed with the plaintiff's assignors, that Pope, who had purchased, or was about to purchase coal of said assignors, should pay such prices at such times as might be agreed upon between them and Pope, for all coal that might be delivered up to January 1, 1878, and in default of his so doing the defendants agreed to pay for the same, provided the amount so in default should not at any time exceed \$1,000. *Held*, a continuing guaranty.

In *Strong v. Lyon*, 68 N. Y. 173, plaintiff having purchased 3,000 shares of certain stock, defendant agreed to save him from any loss on the purchase occurring within thirty days. This guaranty was renewed from time to time. Plaintiff made many other purchases of large amounts of the same stock, and made sales from time to time. The shares first purchased were kept distinct, but all were mingled together so that the identity was lost. The transactions resulted in a loss. *Held*, that the guaranty was not continuing.

In *Boston and Sandwich Glass Co. v. Moore*, 119 Mass. 435, the defendant agreed to "guarantee the sum of \$500 value in glass shades purchased by my son A. from B. Terms of purchase to be sixty days from date of invoice, and if not paid within ninety days, draft to be drawn on me for the amount." *Held*, not a continuing guaranty, and that parol evidence was inadmissible.

In *Hilliard v. Hons*, 37 Tex. 717, the contract was: "Mr. Tucker wants some clothing for a negro and himself, and expects to give you his business. Please let him have the articles he wants and I will see it paid." *Held*, not continuing.

In *Sickle v. Marsh*, 44 How. Pr. 91, the contract was: "The bearer is going to start a peddling route to sell cigars and tobacco. He wishes to buy his goods of your firm if you will give him a liberal credit. We, the undersigned, will be his security to the amount of \$1,000." *Held*, continuing. The court said: "The defendants lay stress on the word start; and insist that it was only for the first purchases that the credit was to be given." "But starting a peddling route certainly implies carrying it on." "It is hardly to be expected that out of the profits of the sales he could keep up his stock and also pay off his first purchases."

In *Crist v. Burlingame*, 63 Barb. 851, the contract was: "I am and will be responsible for any amount for which A. B. may draw on you, for any sum not exceeding \$1,500, on condition of your acceptance of the same." *Held*,

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continuing, and not satisfied by acceptances amounting in the aggregate to \$1,500. A great many cases are reviewed in the opinion.

In *Reed v. Fish*, 59 Me. 858, the instrument read: "Let the bearer buy merchandise to the amount of two or three hundred dollars and I will see you paid." A sale was made to the amount of \$330.80, and subsequently other sales were made to the amount to \$110. *Held*, that only the first was covered.

In *Boehm v. Murphy*, 48 Mo. 57, the instrument was, "Please let Mr. P. Tully have the paints, oils, varnishes, glass, etc., he wants. I will be security for the amount for what he will owe you. *Held*, continuing. Stress was laid on the facts that Tully was about to go into the business, and had no money nor credit. The court said, the contract "would more naturally imply a balance due at the end of the painting season, or when the defendant should put an end to the credit, than a balance of the first bill he might purchase."

See *Cutter v. Ballou*, 136 Mass. 337; s. c., 49 Am. Rep. 35; *Birdsall v. Hancock*, 33 Ohio St. 187; s. c., 30 Am. Rep. 573; *White's Bank v. Miles*, 78 N. Y. 335; s. c., 39 Am. Rep. 157.

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(38 Mich. 437.)

Negligence — expert evidence — violation of ordinance — voluntary risks.

The opinion of a fire marshal as to the cause of a fire is inadmissible.

Keeping ashes in a wooden barrel, in violation of a municipal ordinance, is not negligent *per se*.

One voluntarily exposing himself to danger, in order to save his property from a fire caused by another's negligence, cannot recover therefor.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment reversed.

E. T. Wood and *Willis G. Clarke*, for appellant.

Sylvester Larned, for appellee.

CAMPBELL, J. Plaintiff recovered damages in the sum of \$3,000 for personal injuries claimed to have been caused by defendant's negligence whereby it is alleged a fire was set in a shed occupied by plaintiff. The facts as relied upon were that plaintiff's husband was a tenant of defendant, occupying a wing of her house at the corner of Sixteenth and Canfield streets in Detroit. Behind the house was a low shed divided into three parts by internal partitions from five to six feet high, of which defendant occupied the middle

one, and plaintiff's husband the adjoining one at the north end. In the middle partition was a water-closet used by defendant and her tenants jointly. In this middle part, on the side furthest from Mr. Cook's, was an ash-barrel, which Mr. Cook described as a stout, iron-bound cask, such as is used for liquids. Plaintiff claims that the fire was caused by ashes in this barrel. She and her husband, as they testify, were awakened by the light of the fire burning through the top of this middle part, and as soon as they could they went into their own part and she undertook to get out their horse, that was lying down so that she could not easily loosen the halter. While trying to do this the fire swept over the partition and burned her very severely, so as to nearly or quite disable her from doing her accustomed work.

Several questions arose on the trial, on which rulings were made which were complained of. We shall only notice those which seem to be of most importance.

Among other witnesses sworn was Mr. Baxter, the city fire marshal, who was allowed to testify not only to what he saw on the ground the next day, but also what opinion he had of the origin of the fire, and what he heard from various persons who were there.

This was improperly allowed. That officer's duties are important and he may properly enough make such inquiries as he deems necessary to aid his own judgment. But when the rights and liabilities of private persons are in question, he cannot affect them by his opinions or conclusions, however sagacious he may be. When he testifies, he is governed by the same rules as other witnesses, and cannot give either hearsay or opinions. What is said or done after a fire cannot be regarded as part of the *res gestæ* at the fire, and the sayings and doings of third parties could not usually be receivable. And as for the origin and cause of a fire, it cannot in such a case as this be any more difficult for the jury than for a witness to make deductions from the facts shown. There is no room for expert testimony, and his opinions were not receivable. This testimony was referred to in the charge of the judge, and is quite likely to have had much weight. There were several facts shown which were fairly claimed to have indicated the possibility, if not probability, of a different cause, and the jury should have been left to form their own conclusions, unaffected by any one's opinion. A similar question was decided by this court in *Fowler v. Gilbert*, 38 Mich. 296.

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The court also charged the jury that a violation of the city ordinance requiring ashes to be kept in metallic or other incombustible vessels was negligence in law, for which defendant would be liable, and this was emphasized by the further statement that if this was not done she was not responsible in this case.

This doctrine is not maintainable as stated. The primary object of municipal ordinances is public and not private, and their violation is redressed by the legal penalties. *Taylor v. Lake Shore & M. S. R. Co.*, 45 Mich. 74. City ordinances are necessarily made general, and impose duties which in a given case may be of no special importance. It is quite possible that under certain circumstances, and in various surroundings, it is in no way dangerous to put ashes in wooden barrels, and it can never be dangerous to put cold ashes in them. It is certain that ash-barrels are and always have been more or less used. Whether the use of them is culpably negligent in a given case must usually be a question of fact to be determined by the jury on the facts, and not by the court.

The principal question in the case was upon the liability of defendant if the fire took from negligence for which she may have been chargeable for the damages on which recovery was had in this case.

The plaintiff showed by her testimony that she and her husband saw the ash-barrel daily and knew all about its position. It also appears by the showing of both that the shed, which was entirely open within from end to end, above the partitions, was burning so brightly as to wake them up, and continued burning when they entered to loose the horse and get out the buggy. The danger was before their eyes, and what happened by the sweeping down of the flames was as likely to happen as not. It is not very important by what name the action of plaintiff should be called. It was such a risk as she chose to take, to save her husband's property. But it was a plain and palpable risk nevertheless, and the injury would not have occurred unless for her voluntary act in assuming the exposure.

There is some conflict in the cases concerning what damages have been held not too remote for recovery. But it would be going beyond all reason to hold a person liable for bodily injuries suffered by another in voluntarily and deliberately entering a burning wooden shed not divided into detached parts, and reached by the flames while at work within it. The loss of presence of mind un-

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der such circumstances is one of the commonest and most likely incidents of incurring such an exposure. The act in which she was engaged may have been such as she may have thought proper and laudable, and worth some risk, but defendant's responsibility cannot be created or increased by such independent and voluntary conduct of plaintiff in putting herself in harm's way.

We think that no recovery should have been had on the facts as shown by plaintiff herself, and that the case should not have gone to the jury.

The judgment must be reversed with costs and a new trial granted.

Judgment reversed.

The other justices concurred.

ELLIOTT V. KALKASKA SUPERVISORS.

(88 Mich. 422.)

Municipal corporations — health officers employing nurses.

A township board of health, authorized to guard against small-pox, may contract for nursing patients and destroying infected clothing.*

MANDAMUS. The head-note states the decision.

McIntyre & Dunham, for relators.

Perkins & Ellis, for respondents.

CAMPBELL, J. Each of these relators presented claims allowed by the proper board of health, for services and other dues incurred under their duty to take measures to prevent the spread of small-pox. The supervisors allowed more or less of the accounts, but refused to allow the rest. In their answers they present various supposed excuses for the disallowance. None of them are such as they could lawfully rely upon.

Mr. Elliott's claim is for services as nurse in the pest-house, at \$4 a day — allowed by the supervisors at \$3. There is a showing made, but contradicted, that the board of supervisors desired to have claimant given a fair chance for a full hearing. The objec-

* To same effect, *Labrie v. Manchester* (59 N. H. 120), 47 Am. Rep. 179.

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tions which are shadowed forth are that some of the patients were probably able to pay for their own necessities, and that the charge was exorbitant. There is nothing whatever in the return to indicate that they had any evidence of such pecuniary ability, or that the charges were excessive. Instead of having an open and proper hearing in relator's presence and where he could be represented, the return shows they sent out a committee to make such private explorations as they saw fit, who reported the views of some large tax payers on the subject. It is not remarkable that tax payers should be desirous of evading county charges, but it would be contrary to good sense, as well as law, to allow a public body having legal responsibilities to attempt to shift them off by resting on the advice or wishes of those who have no such duties.

In this case it could make no difference what patients were in the pest-house. Relator Elliott was employed to act as a nurse there, and it in no way concerned him what was the pecuniary standing of its inmates. The board of health have the power and responsibility of providing such a house and nurses to attend it. It was held in *Ras v. Flint*, 51 Mich. 526, that the public is primarily responsible for such expenditures, and that it would be contrary to public policy to endanger the public health by making it impracticable to employ help who would not be sure of their pay. The exigency of a pestilence will not wait for the convenience of parties, and measures must be prompt and effectual. The board of health must have power to make necessary contracts, and this involves all their terms. This was decided in the early case of *Bristow v. Supervisors of Macomb Co.*, 3 Mich. 475. There was nothing in Elliott's claim which was open to inquiry before the supervisors, and they should have allowed it as presented. There is no possible issue left open.

Trenchall's claim was for care of certain small-pox patients under employment from the board of health, and for articles destroyed to avoid infection. These items were within the discretion of that board under How. Stat., §§ 1647, 1648. The destruction of the infected property used in the care of the sick is so plain a necessity as to need no discussion. The return of defendants on this case is much like that in *Elliott's* case, and gives no reason for deferring action in ordering payment.

Paquette's case is not distinguishable in principle from *Elliott's*. It is very much to be regretted that respondents have been so ill

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advised as to attempt to avoid the payment of these claims. The statutes designed to protect the community from infection are of the utmost importance, and persons cannot be compelled to risk their lives to take charge of patients, unless they choose to do so. Suitable and competent persons cannot be procured without fair remuneration. It would be dangerous in the extreme if such matters could be left open to the caprice of any public body, after the immediate danger is ended, where notions of thrift may interfere with those of humanity. The law has not left these matters open to any such risk, and it is the duty of courts to see that it is not disregarded.

The writs must all issue as prayed.

The other justices concurred.

WILKINSON V. HEAVENRICH.

(36 Mich. 574.)

Statute of frauds — mutuality.

A contract of service for more than a year, signed only by the employer, is void for want of mutuality, and the other party cannot make it effective by written acceptance after the employer has refused to perform.*

ASSUMPSIT. The opinion states the case. The defendant had judgment below.

Wheeler & McKnight, for appellant.

Wisner & Draper, for appellee.

CHAMPLIN, J. But one question is involved in this case, and that is as to plaintiff's right to maintain the action. The declaration alleges that on or about the 14th day of October, 1882, the defendants entered into a written contract with plaintiff as follows:

"We promise and agree to pay Thomas Wilkinson wages or salary at the rate of \$3,500 a year, for three years, from the 2d day of October, 1882, in consideration of his working for us that length

* See *Mason v. Decker* (72 N. Y. 595), 28 Am. Rep. 190; also note, 47 Am. Rep. 532.

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of time as cutter in our merchant tailoring department in the city of East Saginaw, Michigan. Payments to be made, as earned, in such sums and at such times as he may desire.

“Dated *October 14, 1882.*

[Signed]

“HEAVENRICH BROS. & Co.”

— that he worked for defendants under this contract, and in the business and employment aforesaid, and was always ready and willing to so work and be employed for defendants for the term of three years in said contract mentioned, and so worked until or about the 5th day of July, 1884, when, without cause and against the wishes and contrary to the will and against the consent of the plaintiff, the defendants wrongfully dismissed and discharged the plaintiff from their employment, and refused to allow the plaintiff to work for them in the employment mentioned in said contract, whereby plaintiff lost the wages and profits and advantages which he would have derived from being continued in said employ, was thrown out of work, and was unable to get any employment for a long space of time, to-wit, for four months. A second count alleges that on the 14th day of October, 1882, defendants entered into another contract with plaintiff, and in consideration that plaintiff would work for them promised and agreed to employ the plaintiff for three years as cutter in defendants' merchant tailoring department, and pay him, as such cutter, at the rate of \$3,500 each year, as earned, in sums and at times desired by plaintiff; that plaintiff entered upon such employment as cutter and worked until about the 5th day of July, 1884, when he was wrongfully and against his will discharged, etc. The plea was the general issue, with notice that plaintiff did not perform the contract on his part, and for that reason they discharged him.

On the trial, after the introduction of the agreement in evidence, it was admitted that the defendants constituted the firm of Heavenrich Bros. & Co., at the time of the making of the contract that is offered in evidence; that plaintiff was discharged on the 7th day of July, 1884; that the defendants paid the plaintiff in full for his services up to the time of his discharge; that upon the 8th day of July the plaintiff served upon the defendants the following notice:

“*Heavenrich Bros. & Co., East Saginaw, Michigan* — GENTLEMEN: I hereby protest against your attempt to cancel our contract. I hold your written agreement for a three years' term of

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service, from October 2, 1882. The contract I am ready and willing to perform on my part, and I hereby offer to continue, and request you to furnish me employment under the terms of that arrangement.

"Dated EAST SAGINAW, July 8, 1884.

[Signed]

"THOMAS WILKINSON."

The plaintiff was sworn in his own behalf, and was cross-examined relative to his performance of the contract on his part; but the scope of his evidence was unimportant, in view of the charge given by the court, which was that there was no mutuality in the agreement, for Mr. Wilkinson was not bound to stay three years, and Heavenrich Bros. & Co. could not be bound to keep him three years, and for want of such mutuality the plaintiff could not recover; and he directed a verdict for the defendants.

The conflict of authority upon questions of the kind raised upon this record is truly bewildering, and the cases are incapable of being reconciled with each other; a large and respectable class holding that a contract which the statute of frauds declares shall not be valid unless in writing and signed by the party to be charged therewith, need only be signed by the party defendant in the suit, and that it is no objection to maintaining such suit and recovering upon such contract, that the other party did not also sign and was not bound by its terms. 2 Kent Com. 510; 2 Stark. Ev. 614; *Smith's Appeal*, 69 Penn. St. 480; *Tripp v. Bishop*, 56 Penn. St. 428; *Perkins v. Hadsell*, 50 Ill. 217; *Old Colony Railroad Corporation v. Evans*, 6 Gray, 31; s. c., 66 Am. Dec. 394; *Williams v. Robinson*, 73 Me. 186; s. c., 40 Am. Rep. 352. Another and equally respectable class of jurists hold that unless the party bringing the action is bound by the contract neither is bound because of the want of mutuality. *Lees v. Whitcomb*, 3 C. & P. 289; *Sykes v. Dixon*, 36 E. C. L. 366; 9 Ad. & El. 693; *Krohn v. Bantz*, 68 Ind. 277; *Stiles v. McClelland*, 6 Col. 89. And see also as bearing upon the question *Hall v. Soule*, 11 Mich. 496; *Scott v. Bush*, 26 Mich. 418; *Liddle v. Needham*, 39 Mich. 147; *McDonald v. Bewick*, 51 Mich. 79. The cases above cited are not intended to be exhaustive on either side of the proposition.

I shall not attempt a reconciliation where reconciliation is impossible; but as the question is new in this State, the court is left to adopt such view as appears to rest upon principle. It is a gen-

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eral principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding, must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. *Hopkins v. Logan*, 5 M. & W. 241; *Dorsey v. Packwood*, 12 How. 126; *Ewins v. Gordon*, 49 N. H. 444; *Hoddesdon Gas Co. v. Hazelwood*, 6 C. B. (N. S.) 239; *Souch v. Strawbridge*, 2 M., G. & S. 808; *Callis v. Bothamly*, 7 Wk. R. 87; *Sykes v. Dixon*, 9 Ad. & El. 693; Add. Cont., § 18; Para. Cont. 449; *Utica, etc., R. Co. v. Brinckerhoff*, 21 Wend. 139; *Lester v. Jewett*, 12 Barb. 502.

Such was the case here. The consideration consisted of mutual promises of the parties, not to be performed within a year from the making thereof. The defendants' promise was in writing, and signed by them; but the plaintiff's promise does not appear in the writing signed by the defendant, nor was any note or memorandum made and signed by him promising to labor for defendant three years or any length of time. Plaintiff was never bound by the agreement. There never was, then, any consideration to support defendant's promises. The agreement was void for want of mutuality. The plaintiff was under no legal obligation to work for defendants a moment longer than he chose, and the defendants were under none to keep him in their employment. The plaintiff could neither revive nor make a contract with defendants after he was discharged by them without their consent and concurrence. The letter written after he was discharged was of no avail.

The judgment is affirmed.

Judgment affirmed.

The other justices concurred.

SHAVER V. INGHAM.

(88 Mich. 649.)

Master and servant — discharge for disobedience.

An employer may not discharge an employee from his factory for a single act of disobedience, in absenting himself for a day, not involving any serious consequences and not unreasonable in itself. (*See note, p. 717.*)

ASSUMPSIT. The opinion states the case. The plaintiff had judgment below.

G. M. Valentine and Van Riper & Worthington, for appellants.

A. H. Potter and N. A. Hamilton, for appellee.

CAMPBELL, O. J. Plaintiff sued and recovered damages for his unauthorized discharge as foreman of defendant's fruit package factory at Benton Harbor. His claim was that on the 1st of March, 1884, having been previously employed, a new arrangement was made for one year, at \$2.50 a day. Defendants claimed that he was not employed for any fixed period, but was given employment when needed. He continued in the place of foreman until September 11, 1884, when he went to Lawrence to look after the foundation of a house that was being built for his mother, and just before leaving for that purpose, which was expected to detain him less than a day, he was discharged. There is a conflict of testimony on the facts, he stating that the discharge was without any cause mentioned, beyond the will of defendants, and defendants claiming that he was discharged for going away against their desire.

The two important issues were therefore — first, the character of his employment as fixed or optional, and second, the lawfulness of his discharge.

Upon the first of these issues the plaintiff, in the course of his testimony, fixed the time when the bargain was made by reference to negotiations he had carried on with various other persons, and among others one Colby, who had sought to employ him, and whose treaty was defeated by the new arrangement. It was in substance that on one of the latter days of February and 1st day of March, plaintiff postponed a final answer to Colby until he

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should come to some definite conclusion whether or not to continue work with defendants, and that on Monday the 3d day of March, after he came to such an arrangement, he gave Colby his final answer declining to serve him.

It was drawn out on cross-examination that plaintiff's mind had been recalled to the time of his contract by remembering negotiations with other parties who wished to employ him, and by the answers he gave them. On re-direct examination he was asked: "How are you able to fix the time of this contract with Mr. Leslie as being the 1st day of March, with reference to Mr. Colby?" This was objected to, and exception taken to overruling the objection. He answered: "By telling Mr. Colby that my time is out; that my time was out. If I don't make an arrangement with them, I will commence with you. I will let you know on Monday. (This was Saturday.) My time was out yesterday." The court had already ruled that the conversation with Colby concerning the nature of the engagement with defendants, being had in their absence, could not be received. We can see no reason why the fact of a conversation was not proper, or why defendants could be damaged by such a statement. If it was not shown to refer to an agreement for a year, it amounted to nothing except as a question of dates, and as to that it was competent.

When Mr. Colby was placed on the stand he was asked: "What was the conversation the 1st day of March?" This was objected to, and exception allowed to overruling it. The court held it was admissible to fix the time. Colby's answer to this question, so far as stating what plaintiff said, was that when Colby asked if he would work for him, plaintiff answered, "My time is out, but I cannot tell you till Monday." There was no error in this. Colby however went on without further inquiry and mentioned that on Monday or Tuesday plaintiff told him he had hired for a year. This was not responsive to the question, but defendants did not object to it, or ask to strike it out, and no exception is based on it. When Colby was asked by plaintiff's counsel to relate the conversation had on Monday or Tuesday, the court at once refused to allow it; and would no doubt have ruled out the volunteered answer, if asked to do so.

Exception was also taken to a further question, whether on Saturday plaintiff gave any reason why he could not tell Colby whether he would accept his offer of employment. The answer

given was that he had not yet closed his bargain, but would let him know on Monday, or the first of the week. There was nothing in this which could prejudice defendants.

The other errors assigned relate to the refusal to charge as requested, concerning defendants' right to dismiss plaintiff.

Upon the facts of the discharge plaintiff and Leslie, one of the defendants, are the only direct witnesses, although there is some other testimony as to admissions. According to plaintiff's testimony Leslie told him that defendants had made up their minds they had got through with him, and on being asked for reasons, answered: "No words or argument about it." According to Leslie, the plaintiff's desire to go on his errand was known to the defendants, as he told Leslie that morning about it. Leslie says he urged him to stay, saying they could not spare him. "It was a very busy time, and he insisted on going. Had some business at Lawrence, I think he said, that he must attend to. I went to the other members of the firm and talked with them." He saw Shaver again afterward, and says: "I went to Mr. Shaver after that and asked him if he insisted on going. He said that he did. I told him if he insisted on going, if his business was more important than ours, that he must attend to it at the neglect of ours, that he could go and stay; that he could consider himself discharged under these circumstances, and he could go to the office and get his pay. He asked me some question in regard to it, and I told him I didn't wish to argue the question. That was the decision. I didn't wish to quarrel with him about it at all. It is not worth while to quarrel about it. It is the final decision of the case, and I turned and left him."

The court below left it for the jury to say whether the plaintiff was discharged without reasonable cause. No exception was taken to the charge as given, but defendants rest their case on the refusal to give two out of nine specific requests to charge, which were as follows:

6. If you should find that the plaintiff left defendants' employ without their consent, when his services were required, then you are instructed that that was a good cause for his dismissal.

7. If the plaintiff was informed on the day he left, by defendant Leslie, that if he went away that he might consider himself discharged, and if you find he did go, then he cannot recover.

It is somewhat questionable whether either of these requests is

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strictly borne out by the testimony. They must be read, in order to make them applicable at all, in accordance with Leslie's own showing. The going was no more than on an errand of short duration. There is no testimony tending to show a voluntary relinquishment of service, and if the sixth request meant any such thing as that, it was not proper. But from the argument we understand that it was meant to cover the facts, and to apply to the temporary departure without leave.

Some cases were cited which are claimed to hold that the departure of a servant for a temporary purpose, against the will of the master, authorizes dismissal without reference to the reasons existing. The case of *Turner v. Mason*, 14 M. & W. 112, was one, where a servant was dismissed for going to see her sick mother, who was supposed to be in danger of death. In that case the court called attention to the fact that it was not averred that the master was informed of the extreme character of the exigency, but the judges nevertheless expressed themselves in favor of his absolute right of dismissal whether so informed or not. No other case seems to go quite so far, but "willful disobedience" of orders is the general phrase used as justifying a discharge; and in some few cases the courts have gone quite far in requiring an extreme rule of duty.

But this doctrine, which is certainly a harsh, if not an inhuman one, has not received entire favor, and has been confined to menial domestic service. In employments not menial and domestic, the case has been left to the jury with more or less latitude for the exercise of good sense.

In *Fillieul v. Armstrong*, 7 Ad. & El. 557, the failure of a teacher to return within a day or two after vacation, although it was strongly urged that the course of the school was seriously interfered with was held not sufficient when set up in a plea to answer the case made by the declaration, and no ground to justify the discharge. The language of the court is clear on the insufficiency of the showing, and it was suggested that even if actual loss was shown, it would be the ground of a claim for deduction of wages, and not of discharge, where there was no serious moral wrong. In *Callo v. Brouncker*, 4 C. & P. 518, the jury were told that there must be moral misconduct, pecuniary or otherwise, willful disobedience or habitual neglect, to justify dismissal from service for a year; and although both disobedience and neglect of orders were

shown in several instances, the court would not let the jury act upon them as serious enough to be sufficient. In that case the servant was a travelling courier. In *Edwards v. Levy*, 2 F. & F. 94, where there was a single act of neglect accompanied by insolence, the court held the plaintiff's case should go to the jury, as this could not be held as matter of law ground for discharge.

The cases of *Cussons v. Skinner*, 11 M. & W. 161, and *Smith v. Allen*, 3 F. & F. 157, in addition to requiring disobedience to be willful, call attention to another element of decision which is especially applicable here. It is held not only that a sufficient cause must be shown, but also that the wrong was actually the real cause of dismissal, and not merely an ostensible reason.

Willful disobedience, in the sense in which the word is used by the authorities, means something more than a conscious failure to obey. It involves a wrongful or perverse disposition, such as to render the conduct unreasonable, and inconsistent with proper subordination. We are not prepared to hold that even in what is known as menial service every act of disobedience may be lawfully punished by the penalty of dismissal and the serious consequences which it entails upon the servant put out of place. No doubt domestic discipline may be closer than that in business employments. But there must be a limit to the arbitrary power of masters.

In such employments as involve a higher order of services, and some degree of discretion and judgment, it would in our opinion be unauthorized and unreasonable to regard skilled mechanics or other employees as subject to the whim and caprice of their employers or as deprived of all right of action to such a degree as to be liable to lose their places upon every omission to obey orders, involving no serious consequences. It appeared in the present case that previous absences by permission had not created any confusion in the business, and it might have been thought and evidently was thought by the jury, if it was not so plain that they were bound to think so, that such a short absence as plaintiff desired could work no mischief and do no wrong. The fact that plaintiff was paid by the day would furnish some aid in getting at such results. It is not pretended that a day's absence from sickness would be a serious drawback. The only possible foundation for dismissal must rest on the idea that the spirit of insubordination was such as to show that plaintiff could not be relied on for

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substantially thorough service. The unreasonableness of his conduct was therefore properly for the jury to determine, it it could be left to them at all, and we have no doubt it could not be determined against the plaintiff by the court. In the recent case of *Jones v. Graham, etc., Transportation Co.*, 51 Mich. 539, we held that an employer can not be the final arbiter in his own behalf whether a sufficient cause of dismissal has arisen, but in dismissing he must assume the responsibility of showing justification. That case is in point here, and the English cases cited, which go as far as any common-law authorities in favor of discipline, are not repugnant to it.

But we can not overlook the other question. Upon the testimony of Mr. Leslie, standing alone, there is no conclusive showing that the occasion of plaintiff's visit to Lawrence was the moving cause, or any thing more than an excuse for the summary and arbitrary course taken on his dismissal. Plaintiff's testimony is very clear that it was not the cause. The court could not have given either of the charges asked for, without losing sight of considerations which seem to us important and significant.

The judgment must be affirmed.

Judgment affirmed.

The other justices concurred.

NOTE BY THE REPORTER. — Mr. Wood says (*Master and Serv.* 216): "There is no question but that in some instances absence for an hour, or even less, would constitute an equally good excuse. In every instance the question is to be determined by the contract, the nature of the business, and the effect upon the master's interests. If a person is employed as a farm hand, and should be absent a day or two without leave, at a time when his services were not especially needed, it might not furnish a good ground for his discharge, but if he should be absent one day without leave in time of harvesting, when his services were greatly needed, and whereby his master's interests were injured, it would be a very good ground for the master to put an end to the contract and employ another person in his place. So too if a workman, employed in a business that while being prosecuted, required the exercise of great skill and constant attention, should absent himself for ten minutes, whereby the master was damaged or even exposed to danger of loss, there can be no question that even this short absence might furnish an ample excuse for the master to dispense with his services. Suppose a pressman, employed upon a daily paper, having the entire charge of putting it to press, should, at the very hour when the paper should go to press, voluntarily absent himself for an hour, whereby the issue of the paper was delayed, and the master lost the sale of a large part of the edition, would not this be sufficient to warrant the master in discharging him?"

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In *Ford v. Danks*, 16 La. Ann. 119, the servant, a plantation overseer, absented himself for one day without leave. *Held*, ground for discharge.

In *Edwards v. Levy*, 2 Post. & Fin. 94, the action was by a musical critic against the proprietor of the "Daily Telegraph" newspaper for wrongful discharge. The plaintiff, being required to attend an opera, was late. "The defendant appeared to have been vexed, and told him it was too late to attend the opera at that hour, for it would be half over by the time he got there. The plaintiff answered that he knew the opera well, having heard it several times. The defendant said that he would be too late, at all events, to abuse the orchestra or overture, which happened to be new that night. The plaintiff, a little annoyed, replied that he was not in the habit of writing what was not true, and that the defendant was ready to abuse or praise for the sake of obtaining advertisements. The defendant was angry at this, and told him to 'leave.' The plaintiff, going away, said he was quite willing to do so, and that if the defendant desired his services he must send for him. There was no theatrical critique in the paper for that night. Next morning the plaintiff wrote to the defendant that he was perfectly willing to attend any of the theaters in the discharge of his duty. The defendant replied that his conduct had been so insolent, that in the absence of all apology he must consider himself dismissed." The question was left to the jury.

In *Callo v. Brouncker*, 4 C. & P. 518, the servant, a travelling courier, had stopped at a hotel where he had been ordered not to stop, and acted sulky, and neglected two or three times to come when summoned.

In respect to *Turner v. Mason*, 14 M. & W. 112, Mr. Wood says (Mast. & Serv. 224, n.): "It may be doubted whether the courts of this country would regard the disobedience of such an order, under such circumstances, the master having notice of the cause of its violation, as such an evidence of insubordination as would justify the servant's dismissal; indeed it would seem that such an order might be regarded as unreasonable. It is true, there is no imperative legal duty upon a daughter to visit a dying mother, but a daughter who knew that her mother was dying, and she was within easy distance of her and did not visit her, would be regarded as destitute of the ordinary instincts of humanity, and most people who are fit to have servants at all would hardly care to keep a person in their employ who had exhibited such heartlessness."

In *Wright v. Gibson*, 8 C. & P. 568, it was held that where a servant absented himself half an hour beyond the proper time on Sunday, this was not cause for dismissal. And so where a gardener was absent one day without leave, it being his first fault. *Thompson v. Douglas*, Hume's Decis. 392. But otherwise as to a gardener absent four days without leave. *Reid v. Lindsay*, Hume's Decis. 398.

A servant, absent four days without leave, pleaded that she went to see her dying brother, and stayed with her mother two days after the funeral to console her and to attend to family matters. *Held*, to justify a dismissal. *Taylor v. Duchess of Hamilton*, Fras. Mast. & Serv. 117.

Fraser says (Mast. & Serv. 115): "The failure on the part of the servant must be something more than mere desertion for a day."

CASES
IN THE
SUPREME COURT
OF
INDIANA.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY
V. SUMNER.

(188 Ind. 55.)

Railroad — contract to erect station — validity.

An action lies for a breach of a contract by a railroad company to establish and maintain a depot at a certain place.*

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

G. W. Easley, S. O. Bayless, W. H. Russell, T. J. Kane and T. P. Davis, for appellant.

D. Moss and R. R. Stephenson, for appellee.

MITCHELL, J. On the 14th day of November, 1881, Sumner and wife conveyed to the railway company a strip of ground sixty-six feet in width, for a right of way over two adjoining tracts of land which the former owned.

The deed contained a recital that it was made upon the consideration that \$200 was paid, and upon the further consideration that

* See note, 86 Am. Rep. 214.

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the grantee covenanted "to made a stock-pass under said road, and a farm crossing over it, and to fence said strip, and further to locate and maintain a depot at the line between the above tracts."

On the 17th day of January, 1883, Sumner brought this suit to recover damages for alleged breaches of the covenants above recited. The breaches assigned are, (1) that the railway company wholly failed and refused to establish and maintain a depot at the place designated, and (2) that it failed and refused to erect and maintain fences, whereby the plaintiff had sustained damages in various ways specified.

[Omitting question of damages.]

Was the stipulation of the deed "to locate and maintain a depot" void? Covenants of the character in question, so far as they have been the subject of judicial interpretation, are of three classes. There are those which stipulate for the location of stations or depots at particular places, and which prohibit the location of others within prescribed limits. All such as contain restrictive stipulations by which the railway company undertakes to prohibit itself from thereafter erecting other station-houses or depots within prescribed limits, are uniformly held to be void, as being violative of public policy.

Railroad corporations are regarded as public agencies, owing duties to the public generally. Accordingly, they can make no contract which shall prohibit them from serving the public as the future demands of business or concentration of population may require. *Williamson v. C., R. I. & P. R. Co.*, 53 Iowa, 136; s. c., 36 Am. Rep. 206; *St. Louis, etc., R. Co. v. Mathers*, 104 Ill. 257; *St. Louis, etc., R. Co. v. Mathers*, 71 Ill. 592; s. c., 22 Am. Rep. 122; *St. Joseph, etc., R. Co. v. Ryan*, 11 Kans. 602; s. c., 15 Am. Rep. 357.

Another class consists of those cases in which an officer or other person supposed to be influential with a railway company, for a consideration promised him, agrees to secure the location of a station, depot or railway at a particular place. A conspicuous case in this class is *Fuller v. Dame*, 18 Pick. 472. All such contracts are void as against public policy. *Bestor v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309.

Still another class is that to which the case under consideration is allied. Such are the cases in which an agreement has been made, between an individual and a railway corporation, for the

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location of a station or depot at a particular place, in consideration of a donation of money or property to the corporation, without any restriction or prohibition against any other location.

No case has been brought to our notice, in which this question was involved, and the decision of which was not controlled by other considerations, which condemn such an agreement. On the contrary, it has been held that an agreement to pay a railway company a stipulated sum, in consideration that it would locate its route at a particular place, is valid and may be enforced. *Cumberland R. Co. v. Baab*, 9 Watts, 458; *First Nat. Bk., etc., v. Hendrie*, 49 Iowa, 402; s. c., 31 Am. Rep. 153. So a conditional subscription of stock is valid. *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499; s. c., 71 Am. Dec. 357; *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539.

A voluntary grant to a railroad, on condition that it would locate its route and establish a depot at a certain place, was sustained as not being in contravention of public policy. *McClure v. Mo. Riv., etc., R. Co.*, 9 Kans. 373.

That railway corporations have power to acquire either by purchase or by donation lands for depot purposes is of course not questioned; and that donations or subscriptions in aid of railways by counties, cities or townships may be subject to terms and conditions in respect to the location of machine shops, depots, etc., is expressly recognized by, and provided for, in §§ 4045 and 4058, R. S. 1881. Such conditions have been held valid in cases of subscriptions made by townships. *Bittinger v. Bell*, 65 Ind. 445; *Brokaw v. Board, etc.*, 73 Ind. 543.

Public policy, as declared by the legislature and enforced by this court, permits counties, cities and townships to make subscriptions or donations to railway corporations, subject to conditions in respect to the location of depots. We can see no good reason why the courts should declare a different policy as between individuals and railway companies.

We should doubt whether in either case a restrictive condition, which should undertake to bind or prohibit the company from providing other facilities which might be needed for the public service at other places, might not invalidate an agreement, but as there is nothing of that character contained in the deed under consideration, we decide nothing beyond the question involved.

The case before us is in many respects analogous to *Watter-on v.*

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Allegheny, etc., R. Co., 74 Penn. St. 208. In that case a land-owner, for a nominal consideration in money, released to the company a right of way over his land, and conveyed to it a lot on which to erect a depot. For a failure to comply with the contract, it was there held that the damage to which the land-owner was entitled was the additional value which the advantages of a depot would have given his land. In a case like this, the damages have no relation to the value of the land conveyed. They are to be determined by the injury actually sustained by the failure of the railway company to perform its contract. *Galveston, etc., R. Co. v. Pfsuffer*, 56 Tex. 66.

[Omitting minor questions.]

The judgment is affirmed with costs.

Petition for a rehearing overruled.

Judgment affirmed.

MURPHY V. STATE.

(106 Ind. 96.)

Criminal law — indictment — charging date.

An indictment charging an offense "on the 16th day of August, 18884," is bad on motion to quash.

CONVICTION of illegally selling intoxicating liquors. The opinion states the case.

E. C. Steele and *W. Hickam*, for appellant.

F. T. Hord, attorney-general, and *W. B. Hord*, for State.

NIBLACK, C. J. Over a motion to quash the indictment, the appellant was tried, and over a motion in arrest of judgment, was convicted of an alleged criminal offense, upon an indictment, the body of which reads as follows:

"The grand jurors of the county of Owen and State of Indiana, on their oath present that, at the county of Owen, and State of Indiana, on the 16th day of August, 18884, one Thomas Murphy did then and there unlawfully sell to John Vaughn, at and for the price of ten cents, a less quantity than a quart at a time, to-wit,

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one gill of whiskey, he, the said Thomas Murphy, not then and there having a license to sell intoxicating liquors in a less quantity than a quart at a time."

The only question made on behalf of the appellant is upon the sufficiency of the indictment, the contention being that the indictment is fatally defective, because the time at which the offense is charged to have been committed is subsequent to the return of the indictment, and is consequently an impossible time.

It is agreed on behalf of the State, that the fair inference from the case of *State v. Sammons*, 95 Ind. 22, is that an impossible date in an indictment is the equivalent of no date at all, and that as section 1756, R. S. 1881, provides that no indictment or information shall be quashed or set aside, or proceeding upon it arrested, for omitting to state the time at which the offense was committed, or for stating the time imperfectly, unless time is of the essence of the offense, the fixing of an impossible date is no longer a cause for quashing an indictment.

The opinion in that case does intimate that the imperfect statement of time there under consideration might, perhaps, have been treated or regarded as the equivalent of no statement of any particular time, but it really decides only that an indictment ought not to be quashed for omitting to state the time at which the alleged offense was committed, or on account of an imperfect statement of the time. There is nothing in that case, either changing or intimating any change in the old rule, that the allegation of an impossible date vitiates an indictment. *State v. Noland*, 29 Ind. 212; Moore Crim. Law, § 162. Nor does the section of the Criminal Code of 1881, referred to, work any change in that rule. It is on the contrary inferable from the case of *State v. Sammons*, *supra*, in question that an indictment is bad which either distinctly states an impossible date or fixes the date of the offense at a time beyond that limited by the statute of limitations. This inference results in part from the rule impliedly recognized in that case, that upon a motion to quash an indictment, it is for the purposes of the motion admitted by both parties that the time at which the offense is charged to have been committed is correctly stated, and partly from the conclusion then reached that the common-law rule, that a day certain not beyond the statutory limit must be stated in an indictment, is still in force in this State, except in so far as it has been changed or modified by some statute. As has

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been seen, section 1756, R. S. 1881, the only section bearing directly on the subject, only renders immaterial the omission to state any time and an imperfect statement of time, and hence only to that extent changes the common-law rule.

Since, upon the motion to quash in this case, it was mutually admitted that the alleged unlawful sale of intoxicating liquor was made at a date subsequent to the return of the indictment, the motion to quash the indictment ought to have been sustained.

The judgment is reversed, and the cause remanded with instructions to the court below to sustain the motion to quash the indictment.

Reversed and remanded.

BURDGE V. BOLIN.

(108 Ind. 173.)

Execution — exemption — gift from husband to wife of exempt property.

Where a husband, whose property is less in value than the amount exempted from execution, gives part to his wife, who invests it in real estate for herself, that real estate is not liable for the husband's debts.

THE opinion states the case.

M. H. Kidd and N. G. Hunter, for appellant.

M. Good and O. H. Bogus, for appellees

Howe, J. In this case the only error assigned by appellant Burdge, the plaintiff below, is that the trial court erred in its conclusions of law upon its special finding of facts.

At appellant's request, the court found specially that the facts of this case were substantially as follows:

Johnson M. Burdge, plaintiff, on the 25th day of April, 1882, recovered judgment in the Wabash Circuit Court against the defendant Elisha Bolin, in the sum of \$1,550.40, and costs, and there was then due and unpaid on such judgment, of principal and interest, the sum of \$1,251. The plaintiff caused an execution to be issued on such judgment by the clerk of the Wabash Circuit Court, on the 11th day of October, 1882, to the sheriff of Wabash county, and such execution was by him returned on the 8th day of

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January, 1883, that no property of the defendant was found upon which to levy. On the 14th day of August, 1882, defendant Elisha Bolin was a resident householder of Wabash county, in this State, and has since continued to be such a resident householder. On such 14th day of August, 1882, he owned household goods and a cow of the value of \$190, and had in money and notes \$350, which constituted all his property of any kind whatever, either within or without this State. On such 14th day of August, 1882, defendant Elizabeth Bolin, purchased the property described in the complaint as lot No. 40, in the town of North Manchester, in Wabash county, of Levi J. Noftzger, at the price of \$1,400. Defendant Elisha Bolin gave to his wife, without consideration, the money and notes aforesaid, amounting to \$350, to be used by her, and it was so used in the purchase of such lot, and constituted the first payment thereon. Elisha Bolin was indebted at the time to plaintiff in the sum of \$1,000, and his wife Elizabeth knew of such indebtedness. The title to such lot had ever since remained in the name of Elizabeth Bolin, and since such purchase, Elisha Bolin never had any other property than the household furniture and cow aforesaid, except his earnings from his labor, which had been consumed in the support of his family.

Upon the foregoing facts the trial court stated as its conclusion of law, that Elisha Bolin, being a resident householder on such 14th day of August, 1882, the personal property aforesaid, amounting to the sum of \$540, was by law exempt from execution, and there was no fraud in his giving his money and notes, of the value of \$350, to his wife and co-defendant, Elizabeth Bolin, and that she was entitled to hold such property as against the claims of the plaintiff.

The single question presented for our decision by appellant's assignment of error may be thus stated: Upon the facts specially found by the court, is there any error in its conclusion of law? We are clearly of the opinion that this question must be answered in the negative. Of course, as we have often decided, by his exception to the court's conclusion of law, appellant admits that the facts of the case were fully and correctly found in the special finding, but he says that the court has erred in applying the law to the facts so found in its conclusion of law. *Fairbanks v. Meyers*, 98 Ind. 92; *Schindler v. Westover*, 99 Ind. 395; *State v. Emmons*, 99 Ind. 452; *Shoemaker v. Smith*, 100 Ind. 40; *Helms v. Wagner*, 102 Ind. 385.

Upon the facts found by the court in the case under considera-

tion, admitted by appellant to have been fully and correctly found, we are strongly impressed with the opinion that the trial court arrived at a just, wise, and equitable conclusion of law. The fundamental law of this State, in section 22 of the Bill of Rights, has enjoined upon the general assembly to recognize the privilege of the debtor to enjoy the necessary comforts of life, by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability thereafter contracted. Responsive to this constitutional injunction the general assembly has provided in section 703, Revised Statutes 1881, that an amount of property not exceeding in value \$600, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of or founded upon a contract, express or implied. This court has uniformly held that our statutes of exemption of a debtor's property from seizure or sale for the payment of any contract, debt or liability, must be liberally construed. *Gregory v. Latchem*, 53 Ind. 449; *Kelly v. McFadden*, 80 Ind. 536; *Puett v. Beard*, 86 Ind. 173; s. c., 44 Am. Rep. 280; *Haas v. Shaw*, 91 Ind. 384; s. c., 46 Am. Rep. 607; *State v. Read*, 94 Ind. 103; *Barkley v. Mahon*, 95 Ind. 101; *Butner v. Bowser*, 104 Ind. 255.

It cannot be doubted, as it seems to us, that the money and notes owned by Elisha Bolin, and by him given to his wife Elizabeth, in August, 1882, were then and there, upon the facts found by the court, exempt from seizure and sale for the payment of any debt, founded upon or growing out of a contract, express or implied. Where the right to an exemption of property from seizure and sale on execution clearly exists under the law, we have often held, and correctly so, we think, that merely formal or technical objections will not be allowed to prevent the debtor from claiming the benefit of his exemption. *Douch v. Rahner*, 61 Ind. 64; *Haas v. Shaw*, *supra*; *Butner v. Bowser*, *supra*.

In the case in hand, appellant sought to enforce the collection of his judgment against Elisha Bolin, by subjecting to sale thereunder a certain town lot, the title to which lot was in Elizabeth Bolin, the wife of Elisha Bolin, upon the ground that he had purchased such lot and made the first payment thereon, and had fraudulently procured the deed of such lot to be executed to his wife, Elizabeth Bolin, with the fraudulent intention of cheating, hindering and delaying his creditors, and especially appellant, in the collection

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of their claims against him. Appellees answered by a general denial of the complaint. The facts found by the court, and correctly found as appellant admits, conclusively show that Elisha Bolin did not purchase such town lot, and that there was no fraud whatever in the purchase or conveyance of such lot to his wife, Elizabeth Bolin.

In *Carhart v. Harshaw*, 45 Wis. 340; s. c., 30 Am. Rep. 752, it was held by the Supreme Court of Wisconsin, that the owner of property exempt from forced sale may sell it or give it away, and when the title has in fact passed to the vendee or donee, the property is not subject to execution for the former owner's debts, whatever may have been his motive in the sale or gift. So in *Delashmut v. Trau*, 44 Iowa, 613, it was held by the Supreme Court of Iowa, that a voluntary conveyance will be held void, as against creditors, only when the property conveyed is liable to be taken in execution for the payment of debts. To the same effect substantially are the following cases from our own reports. *Wallace v. Lawyer*, 54 Ind. 501; s. c., 23 Am. Rep. 661; *Abell v. Riddle*, 75 Ind. 345; *Lowry v. McAlister*, 86 Ind. 543.

We find no error in the record of this cause of which appellant can complain.

The judgment is affirmed with costs.

Judgment affirmed.

HOUCK V. GRAHAM.

(106 Ind. 195.)

Negotiable instrument — surety — contribution — evidence.

A surety who pays a note which he might have avoided because of an alteration by the addition of another maker without his consent, may compel contribution from co-sureties who signed it after such addition.

In case of an irregular indorsement, parol evidence is competent as between the parties, to show that apparent indorsers were sureties.

THE opinion states the case.

O. E. Barrett, J. T. Hays and H. J. Hays, for appellant.

J. S. Bays, J. T. Beasley, A. B. Williams, S. C. Coulson and W. S. Maple, for appellees.

ELLIOTT, J. The material allegations of the second and third paragraphs of the appellant's complaint are substantially the same, and may be thus summarized: That Hostetler and Williams were partners, and as such had executed a promissory note for \$500 to the Sullivan County Bank, upon which Shields and Beasley were sureties; that on the 19th day of May, 1883, the note was due and unpaid; that Hostetler and Williams were then insolvent, and have since so continued; that in renewal of the unpaid note that set forth in the complaint was executed, payable to W. H. Crowder, president; that the note last mentioned was signed by Hostetler and Williams, and by the appellant immediately below their names; that it was then taken to the officers of the bank, who refused to accept it; that thereupon Hostetler and Williams, without the knowledge or consent of the appellant, solicited Sanford Graham to sign it; that he did sign it, and it was again presented to the bank officers, and again rejected; that without the knowledge and consent of the appellant, Hostetler and Williams induced Ephraim Beasley and David Shields to sign the note on the back; that this was done without the consent or knowledge of the appellant, and prior to its delivery to the bank; that Beasley and Shields knew that the note was executed for the purpose of renewing the note on which they were sureties; that after the note had been thus signed on the back by Beasley and Shields, it was accepted by the bank in payment of the note previously executed, and of this Beasley and Shields had notice; that after the note became due it was paid by appellant; that when he paid it he did not know that he was released, but believed that he was liable on the note. Prayer for contribution from Shields and Graham.

It is established by our decisions that as a general rule the addition of a name to a promissory note, without the knowledge of a surety, is such an alteration as releases him from liability. *Nicholson v. Combs*, 90 Ind. 515; s. c., 46 Am. Rep. 229; *Favorite v. Stulham*, 84 Ind. 428; *Bowers v. Briggs*, 20 Ind. 139; *Henry v. Coats*, 17 Ind. 161; *Harper v. State*, 1 Blackf. 61.

This however is a general rule, and applicable to a controversy between the payee and the makers and indorsers, or sureties of the note. Even in such cases it is not without limitations, but we need not here define those limitations, for the reason that in this instance the general rule can have no application at all in favor of the parties who indorsed the note after it was signed by the appel-

tant. The question here is very different from that presented in ordinary cases, since here the party who had a right to complain voluntarily ratified the execution of the note and paid it in full. It seems quite clear to us that those who signed or indorsed the note after it had been signed by the appellants and by the party whose name was added as a maker without his knowledge, cannot successfully insist that he has no rights because he did not resist the enforcement of the note. We can conceive of no reason why the appellant had not a right, at least as against those who became liable on the note after he had signed it, and after the name of another maker had been affixed, to ratify the execution of the note. This he did in the most emphatic way. Our decision on this point is, that the fact that the appellant might have successfully resisted the enforcement of the note does not of itself deprive him of a right to contribution from those who occupied toward him the relation of co-sureties. If the appellees were sureties on the note they were liable to the payee, although as to some of the prior parties the note was invalid. *Hunter v. Fitzmaurice*, 102 Ind. 449; *Helms v. Wayne Agr'l Co.*, 73 Ind. 325; s. c., 38 Am. Rep. 147. Their liability was therefore not affected by the fact that the appellant might, had he so elected, have defeated the collection of the note. Payment of the note did not injuriously affect the rights of the appellees, for they, as subsequent parties, were bound, although the appellant might have escaped liability had he stood upon his legal rights, and hence his adoption of the note did them no injury. *Bowser v. Rendell*, 31 Ind. 128. The ruling of the trial court on the demurrer to the complaint cannot therefore be sustained on the ground that the failure of the appellant to contest the enforcement of the note bars him of all right to sue for contribution.

A more difficult question than that decided remains, and that is this: Can the appellant be regarded as a co-surety with the appellees? It is by no means every case of suretyship in which there is a right to contribution; on the contrary, this right exists only where the relation of the parties is that of co-sureties. *Brandt Suretyship and Guaranty*, §§ 220, 225; *Baylies Sureties*, 321; *Salgers v. Ross*, 15 Ind. 130. If the parties can be regarded as co-sureties, then the appellant has a right to contribution; otherwise he has no such right.

Very many authorities are cited by counsel to prove that the indorsement of a note cannot be so explained by parol evidence as to

show that the liability assumed was that of maker or surety. These authorities would be in point if the indorsement had been regular, and if the controversy were between the holder of the note and the parties liable upon it; but they are not in point here, where the controversy is between the parties liable upon the note and the indorsement is an irregular one. Counsel for appellee mistake the point of the controversy and discuss a question entirely foreign to it, for the point upon which this case turns is whether the relation between those liable on the note may, as between themselves and in respect to such an indorsement as that made by the appellees, be shown by parol evidence. The general rule undoubtedly is that the relation of the parties liable upon a promissory note to each other may be shown by oral testimony. *Dunn v. Sparks*, 7 Ind. 490; *Lacy v. Lofton*, 26 Ind. 324; *Nurre v. Chittenden*, 56 Ind. 462; *Bowser v. Rendell*, 31 Ind. 128; *Core v. Wilson*, 40 Ind. 204; *Houston v. Bruner*, 39 Ind. 376, see p. 383; *Harshman v. Armstrong*, 43 Ind. 126; *Schooley v. Fletcher*, 45 Ind. 86; *Baldwin v. Fleming*, 90 Ind. 177, see p. 180; *Wells v. Miller*, 66 N. Y. 255; *Blake v. Cole*, 22 Pick. 97; *Monson v. Drakeley*, 40 Conn. 552; s. c., 16 Am. Rep. 74; *Craythorne v. Swinburne*, 14 Vesey, 160; *Oldham v. Broom*, 28 Ohio St. 41; *Adams v. Flanagan*, 36 Vt. 400.

The doctrine of the case of *Norton v. Coons*, 6 N. Y. 33, has been often denied, and in effect, though not in terms, is overruled by the case of *Wells v. Miller*, *supra*, so far as it decides any point relevant to the present discussion. Some expressions found in *Armstrong v. Harshman*, 61 Ind. 52; s. c., 28 Am. Rep. 665, seem to indicate a different rule from that here stated by us and sustained by the authorities referred to, but there was no question before the court which rendered it necessary to decide any thing upon the point, for the court said: "No evidence of such contract was given in the cause. Indeed the case was tried on the theory that such contract was unnecessary."

Assuming that the general rule is that the relations between the parties liable on the promissory note may, as between themselves, be shown by parol, our next inquiry is whether this case is within the operation of that rule. *Prima facie*, the liability assumed by the appellees was that of indorsers, and the questions are: 1st. Can the appellant be permitted to show that the appellees were sureties and not indorsers? 2d. Do the facts pleaded show that they were sureties? Of these in their order.

We think that the appellant had a right to show that the appellees were sureties, and not indorsers. It seems clear from the authorities to which we have referred that this would be so even if the names of the appellees had followed that of the payee; indeed, this is expressly decided in some of the cases cited. *Lacy v. Lofton, supra*; *Nurre v. Chittenden, supra*. But in this instance the names of the appellees do not follow that of the payee, for the payee's name appears only in the body of the note. It is therefore, as we intimated, an irregular indorsement. As between the payee and parties liable on the note, it was competent to show that the appellees placed their names upon the note as makers.

In *Browning v. Merritt*, 61 Ind. 425, it was said of the rule just stated, that "This is the law in this State, as settled by numerous decisions of this court." In support of this statement the court cited the cases of *Vore v. Hurst*, 13 Ind. 551; *Sill v. Leslie*, 16 Ind. 236; *Snyder v. Oatman*, 16 Ind. 265; *McGaughey v. Elliott*, 18 Ind. 121; *Drake v. Markle*, 21 Ind. 433; *Houston v. Bruner*, 39 Ind. 376; *Roberts v. Masters*, 40 Ind. 461; *Bronson v. Alexander*, 48 Ind. 244, and *Nurre v. Chittenden, supra*. Other decisions of this court assert the same doctrine. *Armstrong v. Harshman, supra*; *Stack v. Beach*, 74 Ind. 571; s. c., 39 Am. Rep. 113; *Smythe v. Scott*, 106 Ind. 245. The decision in *Kealing v. Vansickle*, 74 Ind. 529; s. c., 39 Am. Rep. 101, does not conflict with the rule affirmed in the cases cited, as appears from what was there said in approval of *Browning v. Merritt, supra*, and indeed from the entire scope of the opinion.

The facts stated in the complaint, and conceded by the demurrer to be true, show that the parties to the note, except Hostetler and Williams, were sureties, for they signed and indorsed the note to give Hostetler and Williams credit, and not in the regular mode. The rule is that where parties appear to be sureties they will be presumed to be co-sureties.

In *Warner v. Price*, 3 Wend. 397, it was said: "They must all be considered co-sureties unless a state of facts be shown to the court from which it shall appear positively, or by legal intendment, that these defendants intended, as to the subsequent signer, to stand in the character of principals." *Bagott v. Mullen*, 92 Ind. 332; s. c., 2 Am. Rep. 351; *McNeil v. Sanford*, 3 B. Monr. 11.

The presumption therefore is in favor of the appellant if he can be regarded as a surety at all, and of this there can be no doubt,

for it is averred that the appellees knew that the note was given in renewal of a note executed by Hostetler and Williams, and on which they were themselves sureties. They and not the appellant were liable on the note which the note now in controversy was executed to pay, and a burden was lifted from them. Equity would seem to require that they rather than the appellant should suffer, for they knew that their principals, for whom they were already bound, were insolvent, and they knew also that the note signed by the appellant was executed to pay the debt on which they stood as sureties for insolvent principals. The facts create a strong equity in favor of the appellant, and show that he has a just claim to compel contribution. It was known to the appellees that the appellant was a surety, but if it had not been known he might have shown that fact.

In the well considered case of *Monson v. Drakeley*, 40 Conn. 552; s. c., 16 Am. Rep. 74, it was said: "If several persons or sets of persons enter into contracts of suretyship which are the same in their legal operation and character, though by different instruments, at different times, and without the knowledge of each other, they will be bound to mutual contribution. 1 Lead. Cas. in Equity, 156, and cases there cited. So far as mutuality in contribution in fact exists, it does not depend on the relation of joint makers of an obligation, but entirely on that of co-suretyship. The signature of a surety is not joint in its character but several, and co-sureties may sign the paper at different times, and indeed different papers, and in ignorance of the undertakings of each other, and still preserve their mutuality with respect to contribution. A party may be so situated as not to be liable to the holder as a maker, and therefore not in a condition to seek contribution from other parties who are sureties, and still retain to them such a relation that in the event of payment by one of them he will be liable to contribute." The decision in the case from which we have quoted goes much further than we need do here, for here it appears that the parties who placed their names on the back of the note knew that the party who now claims contribution was a mere surety. They knew indeed more than this, for they knew that the debt for which the note was executed was one for which they themselves were liable as sureties for insolvent principals, and that their names were required in order to induce the creditor to accept the note in payment of that previously executed.

We cannot agree with appellant that he has a right to collect the full amount of the note from the appellees Shields and Beasley. The utmost that he can claim is that they were co-sureties with him for Hostetler and Williams, and he has united with them in giving Hostetler and Williams credit with the payee of the note. The appellant cannot as against subsequent parties, who signed on the faith of his signature, claim a right to enforce payment of the entire sum evidenced by the note, for his signature, we must presume, induced them to also undertake as sureties for the principals, Hostetler and Williams. As against those who subsequently signed the note, he has a right to ask nothing more than contribution, for the clear implication is that they, acting on the faith that he had signed the note, and was bound upon it, became parties to it as sureties, and as they were sureties with him he can do no more than compel them to share the loss with him. This certainly should be held in all cases where, as here, the party ratifies the transaction by paying the note.

The second and third paragraphs of the complaint show a cause of action, because they state facts entitling the appellant to judgment against the appellees Shields and Beasley for contribution. The prayer for relief does not determine the character of the pleading, nor assign it a particular theory. The facts give it character and effect. It is the substantial facts, and not the general statements in the form of conclusions, made either by a pleader or witness that control a cause. Equity looks through form to substance, and here the substance is that these parties all signed the note for the purpose of giving Hostetler and Williams credit with the payee of the note. *Proctor v. Cole*, 104 Ind. 373. No mere general statements of a witness nor any conclusions of a pleader can change the legal effect of the substantive facts of a business transaction.

Judgment reversed.

New York, Chicago and St. Louis Railway Company v. Auer.

NEW YORK, CHICAGO AND ST. LOUIS RAILWAY CO. v. AUER.

(108 Ind. 219.)

Agister—when considered owner.

An agister having by contract a special ownership and interest in sheep in his custody and in their increase, may maintain as "owner" an action for the negligent killing of them by a railroad company.

ACTION for the value of sheep killed. The opinion states the case. The plaintiff had judgment below.

J. S. Fraser and W. D. Fraser, for appellant.

T. R. Marshall and W. F. McNaghy, for appellee.

MITCHELL, J. Auer recovered a judgment against the railroad company for \$109.50, the value of sheep killed and injured on the company's right of way.

The appellant claims a reversal on the ground that the appellee was not the owner of the sheep.

The facts were found by the court, and were as follows: In the fall of 1882, Daniel Bros. delivered twenty-three sheep to the plaintiff under the following arrangement: Auer was to receive the sheep and keep and care for them on his farm. He had the right at his pleasure to return the identical sheep received, and was to deliver one-half the increase and one-half the wool to Daniel Bros. If any of those originally delivered or of the increase died of disease, or from natural causes, it was agreed that such loss of those delivered, and of one-half the increase, should be borne by Daniel Bros. If any of the sheep should stray away and be lost, or if any should be killed by dogs, or otherwise hurt or injured, Auer was to account for their value. The remainder of the increase were to be his property while he had them in possession. Before those received had been returned, or any division of the increase made, the flock escaped out of Auer's possession, through a defective fence, on to the defendant's right of way. Nineteen were killed by the cars and four injured. Of those killed three were of the number received from Daniel Bros., the remainder were of the undivided increase.

Upon the facts found the court stated as a conclusion that the

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plaintiff was entitled to recover the value of the sheep killed and injured.

The statute which imposes liability on railroad companies for stock killed gives the right of action to the owner of the stock. The question is, who was the owner? As to the undivided increase, the ownership was in the plaintiff. This is upon the principle applied in analogous cases, in which the relation of landlord and tenant exists. The holding in such cases uniformly is, that the title to the whole of that which is to be delivered as rent, remains in the tenant until delivery is made. He is regarded as the owner. For an injury to the property while so in possession of a tenant, he is entitled to maintain an action as owner. *Chicago, etc., Ry. Co. v. Linard*, 94 Ind. 319; s. c., 48 Am. Rep. 155, and cases cited. The case cited and those referred to are not distinguishable in principle from the one under consideration.

By the common law, an agister had such title in virtue of his possession as enabled him to maintain trespass or trover for an injury to or conversion of the cattle. Story Bailments, § 443. Whether one having animals in agistment, with no such special agreement as appears in the case before us, could maintain an action as owner, we need not determine. Under the arrangement set out in the special finding, it clearly follows the plaintiff was the owner.

On behalf of the appellant, it is contended that the right of possession which the appellee had did not invest him with title as owner. Reliance is placed upon the definition of the term "owner." Owner, as defined by Bouvier is, "He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases — even to spoil or destroy it," etc. Within the definition given, we think under the contract, Auer was the owner of the increase until Daniel Bros.' share was delivered to them. He had complete dominion of them, even to the exclusion of Daniel Bros. He was absolutely accountable for the whole number. If he could show that some died of disease or from natural causes he was exonerated from paying the value of those so accounted for. Until the share to which Daniel Bros. were entitled was ascertained and delivered to them, they were not joint owners with the plaintiff. If they had taken possession of the sheep without his consent, he could have maintained replevin against them, and if they had sued for the injury, the railway company could have successfully defended on the ground that Auer was the owner.

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As to the three which were of the number originally received, the conclusion that the plaintiff was entitled to recover for their loss was also correct.

When the sheep were killed or injured, the plaintiff was at once liable to Daniel Bros. under his contract. They could have maintained a suit against him directly.

In the case of *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55, it was held that the borrower of an animal, which was injured while in his possession, stood in the relation of owner to the company on whose right of way the injury occurred.* When one is in possession of property under such an arrangement that he is accountable for it, or for any injury to it in any event, such person may sue to recover for any loss or injury done the property while it is so in his possession. In such a case the person in possession is treated as the owner, and is entitled to all the rights of an owner. *Louisville, etc., Ry. Co. v. Goodbar*, 88 Ind. 213; *Fuller v. Curtis*, 100 Ind. 237; s. c., 50 Am. Rep. 786; Story Agency, § 398.

As the plaintiff had the exclusive right of possession of all the sheep and was liable absolutely and at once for the value of those killed or injured, he was fairly the owner within the meaning of the statute.

The judgment is affirmed, with costs.

Judgment affirmed.

 INDIANA, BLOOMINGTON AND WESTERN RAILWAY COMPANY V.
GREENE.

(105 Ind. 55.)

Negligence—contributory—action for killing person at railway crossing—burden of proof.

In an action against a railway for killing a person at a highway crossing, it must be affirmatively shown that the deceased was free from negligence.†

ACTION for death of plaintiff's intestate by negligence. The opinion states the case. The plaintiff had judgment below.

* This however was *obiter dicta*.—REP.

† See *Schum v. Penn. R. Co.* (107 Penn. St. 8), 52 Am. Rep. 468.

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C. W. Fairbanks, R. B. F. Pierce, W. T. Brush, P. S. Kennedy and S. C. Kennedy, for appellant.

J. M. Thompson, W. B. Herod, T. L. Stilwell and W. H. Thompson, for appellee.

MITCHELL, J. This action was brought by Sarah A. Greene, administratrix of the estate of Joseph W. Greene, against the Indiana, Bloomington and Western Railway Company, to recover damages for wrongfully causing the death of her intestate, who was also her husband.

She recovered a judgment in the court below. A reversal of that judgment is contended for upon two grounds:

1. Because it is said the evidence wholly fails to show that the deceased was free from contributory fault.
2. Because the case was put to the jury on an erroneous theory by the court in its instructions.

Although the record embraces nearly 1,000 pages of testimony, some facts of controlling importance are undisputed.

The deceased, at the time of and for more than six months prior to his death, was engaged in driving a public conveyance between the city of Crawfordsville and the town of Alamo. During this time he had regularly passed over the place where the accident occurred twice each week, and was familiar with the crossing and its surroundings, and with the running of trains on the appellant's railway. So far as appears no change in respect to these had occurred during that period. On the 12th day of March, 1883, while making his usual trip, he was seated on the front seat of a covered hack, in which he was carrying a gentleman and lady as passengers. At the point where the gravel road, along which he was proceeding, crosses the appellant's railway, his hack was brought into collision with one of the appellant's western bound passenger trains. The hack was demolished. The intestate and both passengers were almost instantly killed. No person who lived to give any account of the occurrence, except the engineer on the engine, witnessed the collision, so as to be able to describe the manner in which the deceased approached the crossing. The only evidence upon that subject, other than that given by the engineer, was to the effect that the decedent was seen some 200 yards distant, driving in a "jog trot," in the direction of the crossing. The engineer testi-

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fied that when he first saw the team and hack they were about fifty feet from the track, approaching it rapidly; that the driver was "leaning forward as though he was urging his horses," and that one of the horses was galloping and the other trotting. He reversed his engine and applied the air-brakes, but was unable to stop his engine in time to avoid the collision. There was no impeachment of this witness, nor was his testimony contradicted, although it is claimed that some of his statements are inconsistent with other facts testified to by him.

That the crossing was dangerous, and that on account of a cut through which the track lay the approach of trains from the east could be seen from the highway only by the exercise of more than ordinary prudence and vigilance, is plainly deducible from the somewhat conflicting evidence pertaining to that subject.

The engineer and firemen, as well as several persons who were passengers on the train, and others apparently disinterested who were in the vicinity, testified positively that the whistle was sounded and the bell rung when the train approached the crossing. While a number of persons equally credible, and with equal opportunities for hearing it, were no less positive that no warning whatever was given. In the State in which the testimony is presented on that subject, the jury might well have found, as they did, that no signal was given. It is not disputed that the train was running at a speed of forty miles an hour down-grade.

The salient points in the case, as gathered from the record, are thus presented. From this statement it will be seen that the plaintiff, in her evidence, accounted for the deceased in his progress along the highway toward the crossing, to a point about 200 yards distant from the railway. Leaving him there, advancing upon the crossing in a "jog trot," nothing further is disclosed in her evidence as to the conduct of the deceased, until his lifeless body was taken up from the wreck of the collision. Whether he looked or listened, whether he slackened or accelerated his pace as he neared the crossing, cannot be ascertained from any evidence in the record except that already referred to given by the engineer.

In support of the verdict, counsel say: "The plaintiff made her case upon the positive evidence of many witnesses, that the deceased, Joseph Greene, was run upon and killed by appellant's engine, at a crossing in a deep cut, while such engine (and train) was behind time, running at an unusual and dangerous rate of speed,

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and which approached said crossing coming down a steep grade, without the sound of a whistle or bell as by positive statute required."

Conceding thus much, the evidence still comes far short of making a case upon which a recovery can be maintained. It was absolutely essential that there should have been some evidence exhibiting the conduct of the deceased in approaching the crossing. In order to uphold the verdict, it must have affirmatively appeared, either directly or circumstantially, that he was free from contributory fault. Did he look or listen for the train, or did he continue on in a "jog trot" without thought of impending danger until horrified by the sight of the train, which was inevitably rushing upon him? Upon the plaintiff's case, these questions are left to be determined by conjecture. It is said, because nothing appears to the contrary, we are bound to presume that the deceased was in the exercise of proper care. This would be to supply by presumption that which an unbending rule of law requires should be established by proof.

The principles of law pertaining to actions of this nature were discussed in the recent case of *Cincinnati, etc., R. Co. v. Butler*, 103 Ind. 31. It can hardly be necessary to recur to them again. It may suffice to say, since it is the established rule of this court, as it is of the courts in a large majority of the States, that it must be affirmatively shown that the injured party was in the exercise of due care at the time the accident occurred. At least, it must be made to appear that want of care on his part in no way contributed to bring about the injury, or helped to produce the accident for which compensation is sought. In the case of *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490, which is analogous in principle, this court said: "Where the circumstances point just as much to the negligence of the deceased as to its absence, or point in neither direction, the plaintiff should be nonsuited." *Warner v. New York, etc., R. Co.*, 44 N. Y. 465; *Cordell v. New York, etc., R. Co.*, 75 N. Y. 330; *State v. Maine Cent. R. Co.*, 76 Me. 357; s. c., 49 Am. Rep. 622; *Lesan v. Maine Cent. R. Co.*, 77 Me. 85; *State v. Maine Cent. R. Co.*, 77 Me. 244.

We find the rule well stated in the case of *Hinckley v. Cape Cod R. Co.*, 120 Mass. 257, thus: "Mere proof that the negligence of the defendant was a cause adequate to have produced the injury will not enable a plaintiff to recover, as it does not necessarily give

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rise to the inference of due care upon his part, proof of which is essential to his case." *Allyn v. Boston, etc., R. Co.*, 105 Mass. 77; *Hathaway v. Toledo, etc., R. Co.*, 46 Ind. 25; *Sherlock v. Alling*, 44 Ind. 184.

Many more authorities might be cited in support of the rule under consideration, but it cannot be necessary. It is settled. The facts and circumstances, illustrating the conduct of the injured person at the time of the accident, must be made to appear. If from these the inference can be drawn that proper caution was exercised, it may then be said the presumption of contributory negligence has been affirmatively removed.

Moreover the proposition of counsel assumes that the testimony of the engineer is not to be considered. It proceeds upon the theory that the evidence of this witness in respect to the manner in which the decedent approached the track is to be rejected. We have been unable to discover any thing in the record which justifies this assumption. It must be conceded that the testimony of this witness affords affirmative proof of negligence, rising to the degree of recklessness. It is said the place was one of peculiar danger, and for that reason, the misconduct of the defendant having been established, it cannot be assumed that any reasonable precaution would have enabled the decedent to avoid the peril. As applied to the case of a person unacquainted with the crossing, and the danger incident to it, the argument would have weight. But in a case like this, where the deceased was acquainted with the locality and familiar with all the surroundings, it is not available. Having knowledge of the extraordinary danger, conceding that the crossing was peculiarly dangerous, the most rigid prudence and extraordinary caution were demanded. His own safety required this; while his obligation to those who were helpless in his charge, and who perished with him, should have quickened his vigilance. *Cincinnati, etc., Ry. Co. v. Butler, supra*; *Bellefontaine Ry. Co. v. Hunter*, 33 Ind. 335; s. c., 5 Am. Rep. 201; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274; *Haas v. Grand Rapids, etc., R. Co.*, 47 Mich. 401; *Penn. R. Co. v. Beale*, 73 Penn. St. 504; s. c., 14 Am. Rep. 753; *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railroad Co.*, 114 U. S. 615.

The observance of this precaution, on the part of persons crossing railway tracks, is of the highest importance, not only for their own safety, but for the safety of those travelling on railroads who

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are liable to be killed by trains coming in collision with obstacles on the track. The doctrine of the case of *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522; s. c., 51 Am. Rep. 761, neither cures nor helps out the infirmities in the appellee's case.

We notice briefly one of the instructions which is the subject of discussion. The court added, as a modification to an instruction asked by the defendant, the following: "The allegation that the injury occurred without the fault or negligence of the plaintiff's intestate must be proved by the plaintiff, but at the same time it is a negative averment, and if the plaintiff has shown by the evidence that the injury occurred as charged, resulting in the death of the plaintiff's intestate, and that it was caused by the negligence of the defendant as charged, without showing any contributory negligence or ground for inferring or reasonably suspecting such negligence, she will be entitled to recover without making direct and affirmative proof on that subject. In the absence of circumstances to show or suggest it, there is no presumption of contributory negligence."

Within the principles already stated and the authorities cited, the instruction as modified was erroneous. We are reminded that the modification above set out is substantially a quotation from the opinion of this court, in *Pittsburg, etc., R. Co. v. Noel*, 77 Ind. 110. That was an action against the railroad company for negligently setting fire to plaintiff's wood, which was piled along the company's track. Without considering whether the statement as applied to the case in which it was used was entirely accurate, it is sufficient to say it is not correct as applied to this case. As was said in the later case, *Wabash, etc., Ry. Co. v. Johnson*, 96 Ind. 40: "It may be, and probably is true that when there is evidence making it probable that the plaintiff's carelessness did not contribute to the injury, the jury should infer that he was not guilty of negligence which contributed to the injury." It will not do to say however as the instruction in effect does, that if the plaintiff can show the defendant's neglect and his injury, he may leave his own conduct to conjecture and recover. He must show the facts, as well those which relate to his share in the transaction as those which relate to the defendant's, and if upon the whole case an inference of negligence arises against the defendant, and of due care on his part, he may recover. The fact that a person travelling on a highway comes in collision with a train on a railway crossing,

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is of itself sufficient to suggest a presumption of contributory negligence against him in a suit for compensation.

Questions are made with respect to other instructions given, but as it results from the conclusions already reached that the judgment must be reversed, we do not consider them.

Judgment reversed, with costs.

Judgment reversed.

GRISSOM V. MOORE.

(106 Ind. 286.)

Partnership — real estate — dower.

Where two agree to engage in the milling business as partners, the one to erect a building on a lot which he owns, and convey a half interest to the other, and the other to furnish the machinery, in all of which they are to be equal owners, and the former subsequently conveys an undivided half interest to a third, but dies without conveying to his partner as agreed, his widow has dower in the half of the lot not conveyed, but no interest in the building or other improvements, and the heirs take no interest in either of the lots or the improvements.*

BILL to quiet title. The opinion states the case.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellant.

T. F. Kane and T. P. Davis, for appellees.

MITCHELL, J. On the 25th day of January, 1865, Isaac Grissom was the owner of three vacant lots in the town of Cicero, in Hamilton county. He entered into a contract with John Martz, whereby it was agreed, in consideration that Martz would move the machinery of a certain flouring-mill owned by him into a mill building to be provided, he, Grissom, would erect such building on the lots owned by him and convey to Martz an undivided one-half interest in the lots and building. It was further agreed that they should be thereafter equal owners in the lots and mill, and become partners in the milling business, using the lots and mill in their partnership business.

* See note, 54 Am. Rep. 798.

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The building was erected, the machinery moved into it, and the partnership business entered upon. In August, 1865, Grissom sold his interest in the partnership property, and he and his wife joined in the conveyance of an undivided one-half of the lots to Reitz, who became a partner with Martz in the business. By certain mesne conveyances of their respective interests, the title of Reitz and Martz in the property has been acquired by Moore and Stehman, who are partners in conducting the milling business. The property has been in the possession of the respective owners, and has been used as partnership property continuously from the time the mill was erected and equipped.

Grissom continued to live in the vicinity, and knew of the several transfers of the property. He never claimed any interest in it after his conveyance to Reitz, in 1865.

In 1875 Grissom died intestate, without having conveyed to Martz as he had agreed. He left surviving Margaret Grissom, his widow, who was his wife at the time the agreement was made with Martz, and other heirs who are parties to this suit. Moore and Stehman brought this suit against the widow and heirs, alleging in their complaint that they were asserting an unfounded claim to an interest in the property. They asked to have their title quieted.

The widow and heirs filed a cross complaint, and asked to have the title to the undivided one-half quieted in them.

The court below, having specially found the facts substantially as above recited, stated as a conclusion of law that the plaintiffs were entitled to have their title quieted to the whole property against all the defendants.

Out of the facts found several questions arise: First. As to the rights of the widow.

The husband having been during the marriage seised in fee-simple of the lots mentioned, and the wife never having joined in any conveyance of the undivided one-half, it is not perceived how her rights as widow have been defeated. It is beyond question that the interest of a surviving wife in the partnership real estate, owned by a firm of which her deceased husband was a member, will be confined to what may remain of her husband's interest after the final adjustment of the affairs of the partnership. *Huston v. Neil*, 41 Ind. 504, and cases cited; *Cobbie v. Tomlinson*, 50 Ind. 550. That principle is however not available in this case. The lots were

the individual property of the husband prior to the agreement with Martz. Being thus seised of the property during marriage, he could not defeat the inchoate right of his wife by an agreement to devote it to the purposes of a partnership, nor by any other agreement short of a conveyance in which she should join.

Section 2491, Revised Statutes 1881, secures to the wife, at the death of her husband, one-third in fee-simple in all the real estate of which he may have been seised during the marriage and in the conveyance of which she may not have joined in due form of law. Section 2499 provides that "No act or conveyance performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law, * * * shall prejudice or extinguish the right of the wife to her third of his lands," etc.

The inchoate right of the wife attaches as an incident to the seising of the husband during marriage. It cannot be divested or defeated by any act or charge of the husband, nor otherwise except in the manner above provided. It can only be barred by a conveyance in which she joins or by some proceeding to which all estates are subject, such as the exercise of the power of eminent domain, and the like. Her interest in lands thus owned and conveyed by the husband, in the conveyance of which she has not joined, becomes consummate on his death. It accrues by virtue of the marital relation. She does not take as heir in lands so conveyed. *Rank v. Hanna*, 6 Ind. 20; *Verry v. Robinson*, 25 Ind. 14; *May v. Fletcher*, 40 Ind. 575; *Brannon v. May*, 42 Ind. 92; *Bowen v. Preston*, 48 Ind. 367; *Derry v. Derry*, 74 Ind. 560; *Hendrix v. McBeth*, 87 Ind. 287; *Mark v. Murphy*, 76 Ind. 534.

It is clear therefore that upon the death of her husband Margaret Grissom became entitled to one-third in fee-simple in the undivided one-half of the lots.

The question still remains, did she take any interest in the improvements?

Under the agreement found by the court Grissom contributed the lots and the building to the joint enterprise, and Martz the mill machinery. The several contributions were thus brought into the firm as stock or firm property. Substantially, it became the capital stock of the firm, and as respects the partners, and those claiming through them, it was impressed with the character of partnership property. *Roberts v. McCarty*, 9 Ind. 16; *Huston v. Neil*, 41

Ind. 504; *Clark's Appeal*, 72 Penn. St. 142; *Hiscock v. Phelps*, 49 N. Y. 97; *Lindley Partnership*, 652, and notes.

Improvements made even on lands owned by one partner, if made with partnership funds, or for the purpose of the partnership, are to be treated as the personal property of the firm. *Lane v. Tyler*, 49 Me. 252; *Averill v. Loucks*, 6 Barb. 19. That each partner contributed distinct portions of the improvements, did not make it different. When brought together they constituted partnership property none the less.

As we have already seen, the inchoate right of the wife in the lots was not subject to be defeated by the agreement with Marts. Her interest attached by virtue of the seisin of her husband, and he was seised before the agreement was made. It was not so with respect to the improvements. These became partnership property before any rights of the wife attached. Since they were the contributions of the partners to the capital of the firm, they became partnership assets, the same as if they had been acquired with the funds of the partnership, and are to be treated as personal property belonging to the firm. In the improvements, as in all other personal property of the firm, the rights of the widow and heirs are subject to the adjustment of all claims between the partners and attach only to the surplus which remains when the affairs of the partnership are wound up. *Matlock v. Matlock*, 5 Ind. 403; *Huston v. Neil*, *supra*; *Cobble v. Tomlinson*, 50 Ind. 550; *Haas v. Shaw*, 91 Ind. 384; s. c., 46 Am. Rep. 607; 1 Scrib. Dower, 563.

The husband having sold his interest in the property, which as we have seen became personal assets of the partnership, he had at the time of his death no estate therein which the law cast upon his heirs.

As to the lots in which she took an interest by virtue of her marital rights as purchaser, the widow is entitled to have her title quieted as of the date of her husband's death. In all such property, as she must have taken as heir, inasmuch as her husband had disposed of it in his life-time, there remained nothing for her to take. Necessarily what has been said of the rights of the widow as heir disposes of the case in respect to all others who claim as heirs. Since under the agreement found by the court both the lots and the improvements made thereon became impressed with the character of personal property, the agreement between Grissom and Marts having been so far performed as to take it out of the opera-

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tion of the statute, and because the ancestor had sold his interest in the property in his life-time, nothing remained for the heirs.

[Minor points omitted.]

As to Margaret Grissom, the judgment is reversed with costs, with directions to the court below to state conclusions of law in her favor and quiet her title, consistent with the foregoing opinion. As to the other defendants the judgment is affirmed.

LAMMOTT V. EWERS.

(108 Ind. 319.)

Water and water-courses—grant of mill site—right to maintain dam.

Where the owner of an estate conveys a part, upon which is a mill, with a dam, "and all the water-rights and privileges thereunto belonging and appertaining," subsequent purchasers of the servient estate take it subject to the right of the holders of the mill property to maintain such a dam as will raise the water to the ordinary height before the grant, and where that height was obtained by the use of flash-boards they may maintain a permanent dam of the same height.

ACTION to abate a mill-dam. The opinion states the case. The plaintiff had judgment below.

H. C. Fox and J. H. Kibbey, for appellant.

C. H. Burchenal and J. L. Rupe, for appellee.

MITCHELL, J. This action was brought by Lammott against Ewers to compel the partial abatement of a mill dam, erected by the latter across White Water river, in Wayne county. A further object of the suit was to enjoin the defendant from making a proposed extension of the dam eastward, across an artificial channel which had been washed around the east abutment. In addition, damages were claimed for flowing the plaintiff's lands by means of the dam erected by the defendant and for causing the artificial channel above mentioned to be washed through his soil.

The defendant sought to justify under a grant of certain water privileges contained in a deed from a remote grantor, through whom both the plaintiff and defendant claimed title to the respective properties which were the subjects of litigation.

It was conceded that on and prior to the year 1847, one Jacob Sinks owned all the land involved, as well that now owned by the plaintiff as that upon which the dam and mill belonging to the defendant are situate. While so owning the lands he built a mill upon the site now occupied by the defendant's mill, and raised a dam near the place where the defendant afterward erected the structure which occasioned the present dispute. Subsequently Sinks conveyed the mill and dam erected by him, together with the lands now owned by the plaintiff, to Levin Warren.

In 1865, while owning the whole, Warren conveyed by deed of general warrant to one Petty, an irregularly shaped tract of land, described by metes and bounds, containing four acres and a fraction. With the land there were also granted such further rights as are embraced in the following stipulation written in the deed, viz.: "Together with the dam across the river, and all the water-rights and privileges thereunto belonging or appertaining, and the race supplying said mills with water from said dam, with the privilege of entering upon the land along said race for repairing the same and obtaining soil and gravel at the most convenient place along and in the river for repairing said dam."

The plaintiff derived his title to the lands alleged to have been injured, by mesne conveyances subsequently made from Warren.

The theory of the defendant below was, that as Sinks, while the owner of the whole estate, had built a mill, and erected and maintained a dam, in a manner to create and afford certain water privileges, and that as Warren had acquired the whole estate, and had continued to maintain a dam, and use the water rights and privileges thus created and enjoyed by Sinks, in the manner hereinafter described, for a long period of time, prior to the conveyance to Petty, the grant of the dam and water rights and privileges contained in that deed subjected the remaining lands owned by Warren, and since acquired by the plaintiff, to a continuing burden, the extent and measure of which was limited only by the extent of the previous use.

On the other hand, the plaintiff's claim was that the basis of the defendant's right rested upon prescription or adverse user, and that the extent of his right was to maintain the dam in the physical condition it was actually and visibly in at the time the conveyance was made from Warren to Petty, or at most, that the right granted was to enjoy the privilege in precisely the same manner that it had

previously been used. In short, that the words, "together with the dam across the river, and all the water rights and privileges thereunto belonging and appertaining," operated only to convey the dam as it existed when the deed was made.

At the trial the evidence was mainly directed to two points: 1. The height and extent of the dam, and the manner in which it set the water back, at and prior to the conveyance from Warren to Petty, in 1865. 2. The height at which the dam had been maintained, its location and extent, and the manner in which it affected the stream above from the time it was first built until the commencement of the suit.

The cause was tried as a chancery case, a jury having been called by agreement to find certain facts, in answer to interrogatories to be prepared and submitted to them by the court, upon which findings of the jury, with such others as the court should deem it proper to make, it was agreed, judgment should be rendered according to law.

The facts specially found by the jury and those which were undisputed were: That the lands were owned by the parties, and their respective rights had been acquired, substantially as hereinbefore stated; that Sinks and Warren successively for a period of twenty-four years, prior to the conveyance by Warren to Petty, maintained a dam across White Water river, at or about the point occupied by the defendant's dam. The height of the dam proper, as usually and ordinarily maintained prior to 1865, was four feet and ten inches. In addition to a permanent frame dam of the height above mentioned, flash-boards, eight inches in height, were maintained on the top of the structure whenever it was desirable to do so. These were held in place by means of strong iron staples which were driven into the breast of the dam and into which standards were adjusted for the support of the flash-boards. They were put on and readjusted whenever needed to supply a full head of water, and were maintained in place, except as they were carried away by drift and floods. Such as were so carried off were replaced when the water subsided, so as to require their restoration in order to supply the required head of water. The dam proper, with the flash-boards thus mentioned, was five feet six inches in height. In 1881, having previously acquired the mill and appurtenances, and the old structure having been partially carried out, the defendant rebuilt the dam permanently, to the height of five

feet and six inches. The new structure raised the water at the dam and in the stream which flowed through plaintiff's land, eight inches higher than it was accustomed to stand as the dam was usually and ordinarily maintained by Warren. During floods, or periods of high water, the new dam caused a greater overflow of plaintiff's land than the old one did. At all ordinary stages of the river, the new structure caused no greater injury to, or flow of water upon plaintiff's land, than was caused by the old one. Since the dam was reconstructed, during a prevailing freshet a new channel was cut through plaintiff's land at the east end of a levee which has been maintained from the first at a height corresponding with the height of the dam. This was caused by the new structure having been raised to a greater permanent height than the old dam formerly was. The damage resulting to the plaintiff's land by the cutting of this new channel was found to be \$25. It is expressly found that in all other respects, the erection of the new dam has occasioned the plaintiff no other or different damage than he would have sustained if the dam had been maintained as it was prior to the conveyance from Warren to Petty. It is further found that the dam cannot be extended across the new channel at any other place than that proposed by the defendant, with greater security to the defendant, or less damage to the plaintiff, and that the proposed extension will not cause any more damage to plaintiff's land than if the dam and levee should be constructed in the precise manner in which they were maintained prior to 1865.

Upon the facts thus found by the jury, which with the facts admitted or not seriously in dispute, were substantially all the facts material in the case, judgment was rendered in favor of the plaintiff for \$25 for his damages. With respect to the abatement of the dam prayed for, and in regard to preventing the extension proposed, the judgment was for the defendant.

The only question presented by the errors assigned is, taking the undisputed facts as true, and assuming that the evidence tends to support the facts as found by the jury, was the judgment of the court below according to the law of the case? This will depend upon the effect attributable to the deed from Warren to Petty, both as respects the lands with the water-rights and privileges therein granted, as also the lands with the easements and burdens thereon imposed, which were retained by the grantor. Whatever rights Petty might have asserted against Warren after the deed was made,

the defendant may now assert against the plaintiff, a remote grantee of Warren. This result flows from the fact that Warren, the common grantor, while owning the whole estate, subjected that to which the appellant has succeeded to a burden in favor of that which by a prior conveyance has come to the appellee.

Since the grant of a right carries with it of necessity all the incidents and privileges connected with the right granted, which are necessary to its enjoyment, the grantees of Warren, near and remote, acquired as against him, and all who stand in his place, the right to maintain a dam of the efficient height to hold back water, so as to produce a head or power equal to that which was rightfully appurtenant to the mill at the time of the conveyance referred to. It is of no consequence whether the head customarily maintained was by one method or the other. The right granted was the efficient head or water power which had become appurtenant to the mill. The grant related to the thing, and not to the means by which it was produced.

The doctrine is too familiar to justify elaboration, that when the owner of an estate, during such ownership, has by artificial arrangements made one part subservient to the other, thus enhancing the value of one by burdening the other, the conveyance of that, the value of which is thus enhanced, will carry the right to an easement in the other, to the extent necessary to the enjoyment of that granted, in the same condition in which it was enjoyed before. *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582; s. c., 53 Am. Rep. 550. Petty's grantor had, by the previous use, imposed a burden on one part of his estate in favor of the other. The right to continue this burden was one which he had the power to grant. It passed with his grant of the mill and the water-rights appurtenant to it. *Green v. Collins*, 86 N. Y. 246; s. c., 40 Am. Rep. 531.

As applicable to water-rights, in a case where such rights are granted without being otherwise specifically defined, since they are in a measure at least incorporeal and invisible, they are measured and limited as against the grantor, by the extent to which they were designed to be used, and had actually been made available for and applied to use.

The height at which the superstructure forming the dam had been, or might thereafter be raised, not having been specified in the deed, there were at least two practical tests by which to ascer-

tain the extent of the undefined water-right granted in the deed. One was the height at which the water had been usually and ordinarily maintained at the breast of the dam, without regard to means employed in raising it. The other was the distance the water set back during the ordinary stages of the stream.

It may be admitted that there was some conflict in the testimony concerning the purpose for which the flash-boards were applied, but there was evidence fairly tending to prove that they were part of the dam as originally constructed, and that they were necessary, except during periods of high water, in order to raise the water so as to afford the proper head.

It is in the light of this evidence that the facts found must be considered. That some of the flash-boards were carried off during freshets, and that they were not restored until the water subsided, so as to render their restoration necessary in order to afford the proper head, does not affect the question. That the former owners, exercising their pleasure as to means, chose to maintain the efficient head of water, by the use of flash-boards, did not affect the right of their grantees to maintain the same head by a method more stable and permanent.

The effective height of the dam is that which governs. The grantees of Warren acquired the right by grant to maintain a permanent dam which would raise the water to the same effective height to which it was usually and ordinarily raised before the conveyance was made.

This right, it must be remembered, was not predicated on prescription; it was acquired by express grant. The extent of the use prior to the grant was only referred to in order to ascertain the extent of the right granted. Whether if the right had depended upon prescription, the use of the flash-boards, as shown, was so continuous or of such a character as to have raised the presumption of a grant, we need not determine. What we decide is, the owners of the estate prior to the grant to Petty, having exercised the right at their pleasure to keep flash-boards on top of the dam whenever they deemed it necessary to provide an efficient head of water at a certain height, made it a right appurtenant to the mill property to maintain such head at the same height by any other efficient means. The deed to Petty granted that right as appurtenant to the mill, and imposed the consequences as a burden upon the property owned by the plaintiff. The following, among other authori-

ties, bear upon and have some analogy to the case under consideration. *Cowell v. Thayer*, 5 Metc. 253; s. c., 38 Am. Dec. 400; *Ray v. Fletcher*, 12 Cush. 200; *Daniels v. Citizens' Saving Institution*, 127 Mass. 534; *Voter v. Hobbs*, 69 Me. 19; *Lacy v. Arnett*, 33 Penn. St. 169; *Hynds v. Shults*, 39 Barb. 600; *Marcy v. Shults*, 29 N. Y. 346; Angell Water-courses, § 380.

The learned author above cited summarizes the result of the authorities, as applied to rights acquired by prescription, in the following language: "Where the owners of a dam have for a period of twenty years made use of flash-boards on their dam for the purpose of retaining the water during periods of the year when it was low, they may acquire a right to substitute for any portion of such flash-boards a permanent structure, so long as the height of the dam is not raised thereby and no injury is done."

As against the grantor of a water-right, a rule not less favorable to the grantee than that above stated should obtain.

The findings show that the permanent structure raised by the defendant is of a height corresponding with the old dam when the flash-boards were adjusted to it. Unless this raised the water in the stream to such an extent beyond its former height, as to set it back upon and affect the plaintiff's land injuriously, it was within the terms of the grant.

It is true the jury find that the new dam raises the water eight inches higher in the stream than the old one did, as it was usually and ordinarily maintained. But they also find that in all ordinary stages of the river the water is not thrown upon the plaintiff's land in a manner to injure it more than formerly.

As already observed, the efficient height of the dam when in an effective condition to hold back the water to the height at which the former proprietors at their pleasure held it back, is the measure of the defendant's right.

This cannot be determined absolutely by observing the varying and fluctuating conditions of the stream during momentary freshets. Especially is this so when the actual height of the several structures as ascertained are found to correspond, and when it is found that in the ordinary stages of the river no material difference in its height is discoverable.

An obvious reason exists for the fact that since the top of the dam has been so constructed as not to yield to the pressure of drift and flood, the water is during certain periods thrown upon the

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plaintiff's land to a greater extent. The fact that the dam is made permanent however does not affect the right, as the right can be exercised without injury to the plaintiff.

The right to make the extension of the dam necessary to close up in a permanent manner the artificial channel, results from the terms of the grant. We do not stop to go into details. It is sufficient to say the jury having found that the extension proposed tends to the better security of the dam, without injury to, or invasion of, the property of the plaintiff, no reason is perceived why it may not be extended.

Upon the whole case we think a right result was reached, within the rules of law.

The judgment is affirmed, with costs.

Judgment affirmed.

STATE V. GREENSDALE.

(106 Ind. 364.)

Guardian and ward — acceptance by guardian of note to predecessor.

A guardian who accepts as part of his ward's estate a note payable to a preceding guardian individually, takes it at his own risk.

ACTION on a guardian's bond. The opinion states the case.

A. Elliott, for appellant.

S. B. Voyles and H. Morris, for appellees.

ELLIOTT, J. The complaint is founded upon a guardian's bond executed by the appellee Greensdale as principal, and the other appellees as sureties.

The fourth paragraph of the answer contains these allegations: That Isaac C. Boyden was the guardian of the relator, McIntosh, prior to the appointment of Greensdale; that while Boyden was such guardian, he lent \$172 of his ward's money to Isaac Koche-nour and received from him a promissory note therefor, with Thomas Vance as surety; that when Greensdale accepted the note the makers were the owners of a large amount of real and personal property and were solvent; that some time after the acceptance of

the note Boyden died, and Greensdale was appointed his successor as guardian of the relator; that the note which was payable to Boyden, not having matured, came to the hands of Greensdale as part of the assets of his ward's estate; that it was accepted "not in lieu of money, but in the condition in which it then was;" that when the note became due suit was brought on it, judgment recovered, and execution issued; the execution was returned "no property found," whereupon the appellee Greensdale instituted an action as guardian to set aside conveyances of property made by Kochenour and Vance, on the ground that they were made for the purpose of defrauding creditors. To this answer a demurrer was addressed, and upon the ruling of the court against the relator on the demurrer, error is assigned.

The position of the relator's counsel is: That as Boyden took the note of Kochenour and Vance, payable to himself personally and not as guardian, the note was no part of the ward's estate, and should not have been so received by Greensdale. It is undoubtedly the general rule that a guardian who takes a note payable to himself cannot, in case the makers of the note prove insolvent, escape liability to his ward by asserting that the money loaned was that of the ward. The policy of the law is to compel guardians to keep their ward's money separate, and not commingle it with their own. This is a wise policy and is the only one that will justly protect the estates of infants and prevent wrongs and abuses. If a guardian were permitted to assert that a note payable to him personally was that of his ward, then a way would be made easy to grave frauds, since it would be easy to assert that the money lost by the unfortunate investment was the ward's and not the guardian's. On the other hand, if an investment of the ward's money should be made in the guardian's name and should prove profitable, the guardian might readily claim it as his own and thus deprive his ward of a right justly his. It is to prevent such wrongs that the law requires the guardian, when he invests his ward's money, to take notes in his trust capacity. It is no doubt true, that where a guardian, administrator or receiver, or indeed any trustee of like character, acts with ordinary care and in good faith, and either lends money or deposits it in bank and takes an evidence of the loan or deposit payable to himself as guardian, administrator, receiver, or the like, he is not responsible for the loss of the money so loaned or deposited. *Norwood v. Harness*, 98 Ind. 184; a. c.,

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49 Am. Rep. 739; *Marquess v. La Baw*, 82 Ind. 550, see p. 553; *Sanders v. State, ex rel.*, 49 Ind. 228.

If there had been any words added to Boyden's name denoting that the note was payable to him in a trust capacity, then doubtless the note might be treated as part of the trust estate, for words which show that the investment was kept separate from the personal estate of the trustee will prevent the operation of the rule, making the trustee liable where he fails to keep the trust money separate from his own. *Bundy v. Town of Monticello*, 84 Ind. 119; *Shaw v. Spencer*, 100 Mass. 282; *National Bank v. Insurance Company*, 104 U. S. 54.

In this case however there was nothing to mark the evidence of indebtedness as belonging to the estate of the ward; on the contrary, the note on its face evidenced a debt due to Boyden in his own right. The case therefore falls within the rule thus stated by an American author: "Money temporarily in the guardian's hands should be deposited in some responsible bank. But wherever placed and however invested, the trust funds should be separated by distinguishing marks from his private property; exceptions occurring however in some cases of a temporary deposit, as for instance where the money is left in one's iron safe with his private valuable papers for no unreasonable length of time and under circumstances imputing to him no want of ordinary prudence and diligence, either in placing and keeping it there in that condition, or in pursuing the thief who took it out. Otherwise, he would be personally liable for loss." *Schouler Dom. Rel.*, § 352. At another place, in the same section, it is said: "So if he purchases stock or takes a promissory note in his own name it will be treated as his own, but not necessarily to the ward's prejudice, for it might otherwise be clearly identified and traced as the ward's property." This is undoubtedly the general rule.

The note which Greensdale accepted was therefore not a part of the assets of his ward's estate; hence it was a breach of duty for him to accept it. If it was not a part of the ward's estate, it is clear on principle that he was guilty of a violation of duty in taking it from the estate of his predecessor, and this doctrine has been expressly asserted by this court. *Bescher v. State*, 63 Ind. 302. In that case it was held that a guardian had no right to accept as part of his ward's estate a promissory note payable to his predecessor, and as sustaining the ruling the court cited *State v.*

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Womack, 72 N. C. 397; *Crawford v. Brawster*, 57 Ga. 226; *Jones v. Jones*, 20 Iowa, 388; *Lane v. Mickle*, 46 Ala. 600. These decisions are decisively against the appellees. They however rely upon the case of *Richardson v. State*, 55 Ind. 381, which is the only authority cited by them. That case is of doubtful soundness, and the point relevant to this discussion seems to have been decided without much consideration and without any discussion of the authorities. Conceding however that it was well decided, it does not rule here, for all that was there decided that bears upon the present case was, that if a guardian takes a note for money of his ward payable to himself, it is not a conversion of his ward's estate, but is mere evidence of conversion. Here the question is, has a guardian who succeeds another a right to take as part of his ward's estate a promissory note payable to his predecessor individually? and there was no such question in that case. We regard it as clear, on principle and authority, that a guardian has no right to take as money such a note, and thus imperil his ward's estate.

Judgment reversed.

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(106 Ind. 386.)

Criminal law — separation of jury — waiver.

Even in a capital case, if the court permits the jury to separate before submission, and the defendant does not object until after verdict, the objection is waived.

CONVICTION of murder. The opinion states the point.

J. R. Courtney, for appellant.

F. T. Hord, attorney-general, *F. M. Howard*, prosecuting attorney, and *W. B. Hord*, for State.

ELLIOTT, J. The appellant prosecutes this appeal from a judgment declaring him guilty of murder in the first degree, and adjudging that he suffer the penalty of death.

[Omitting other points.]

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The appellant's counsel stoutly maintains that the court erred permitting the jury to separate without the express consent of the appellant. This position is met by the State with two propositions:

First. The appellant, having knowledge of the ruling of the court, and interposing no objection until after verdict, waived his right to object.

Second. The court had a discretionary power to permit the jury to separate at any time during the progress of the trial prior to the time the case was finally submitted to them.

If the State is right upon the first proposition, the discussion of the second is unnecessary. The facts support the State's contention so far as respects the question of knowledge and opportunity to object, for it clearly appears that the separation of the jury was known to the accused and his counsel, and that the attention of the court was directed to it by them on the following morning. No ruling however was then asked of the court, but the cause was permitted to proceed to verdict without any intimation of dissatisfaction on the part of the defendant. The question for our decision is, what is the law upon these facts?

There is a case directly in point, that of *Polin v. State*, 14 Neb. 540, and if it correctly expresses the law the State has successfully maintained its position. In that case it was said: "The objection first appeared in a motion for a new trial, and came too late." At another place in the opinion it was said: "Parties litigant, even in criminal cases, must deal fairly by the court. They are not permitted to withhold information of matters transpiring in the progress of a trial, whether prejudicial or otherwise, and thus, without objection, permit it to proceed to a conclusion, and then take advantage of them. Generally, all objections not jurisdictional as to the subject of the litigation must be made at the first opportunity, or they are deemed to be waived. The rule in such cases is, that a party shall not be permitted without objection to take the chances of a favorable result, and then if disappointed, for the first time complain." Our own cases, proceeding upon this general principle, have repeatedly asserted that if a defendant, in a criminal case, whether a capital case or not, fails to object and except at the earliest legal opportunity, he waives his right to afterward assail the ruling. *Barlow v. State*, 2 Blackf. 114; *Hornberger v. State*, 5 Ind. 300; *Wheeler v. State*, 8 Ind. 113; *Leyner v. State*,

8 Ind. 490; *Mullinix v. State*, 10 Ind. 5; *Murray v. State*, 26 Ind. 141; *Stone v. State*, 42 Ind. 418; *Noe v. State*, 92 Ind. 92.

The principle that an accused may waive a right extends to the highest rights, even to those secured by the Constitution. *Shular v. State*, 105 Ind. 289; *Butler v. State*, 97 Ind. 378; *Veatch v. State*, 60 Ind. 291; *Boggs v. State*, 8 Ind. 463; *In re Staff*, 6 Crim. Law Mag. 828; Waiver of Constitutional Rights in Criminal Cases, 6 Crim. Law Mag. 182.

There are a great number of cases declaring that a defendant in a criminal case may waive objections by failing to insist upon them at the proper time in the trial court. *Pontius v. People*, 82 N. Y. 339; *State v. Benton*, 65 Iowa, 482; *Waite v. State*, 13 Texas App. 169; *People v. Cochran*, 61 Cal. 548; *Green v. State*, 59 Miss. 501; *State v. Furbeck*, 29 Kan. 532; *People v. Haley*, 48 Mich. 495; *People v. Rielly*, 53 Mich. 260; *Commonwealth v. Maher*, 4 Crim. Law Mag. 411; *Firmeis v. State*, 61 Wis. 140.

It was said of the case of *Commonwealth v. Stowell*, 9 Metc. 572, by this court, that "The court say, in reference to an erroneous ruling on the trial below, that as the defendant had an opportunity, but failed to avail himself of it on the trial, of making his objection, his acquiescence was a waiver, and estopped him to raise it afterward." *McCorkle v. State*, 14 Ind. 39; *Preston v. Sandford*, 21 Ind. 156, see p. 158.

These authorities clearly establish the general doctrine that if a defendant has knowledge of a matter affecting his rights and fails to ask a ruling upon it, or if he fails to avail himself at the earliest opportunity of objections known to him, he cannot afterward successfully complain, and we can see no reason why the general principle should not apply to such a case as the one before us. There are however cases closely allied to the present which will present the question in a still clearer light, and of them we think it profitable to speak.

In *Cluck v. State*, 40 Ind. 263, one of the jurors took written notes of the evidence, and this was held to be an error, but it was also held, that as the defendant knew what the juror was doing, and made no objection until the motion for a new trial, he could not make the error available. *Long v. State*, 95 Ind. 481.

A juror became ill and unable to comprehend the argument of counsel, but although this fact was known to the defendant and his counsel, they proceeded with the case, and a verdict affixing

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the death penalty was returned. After verdict the appellant sought a new trial on the ground of the incapacity of the juror, but the court held that the new trial was rightly denied, for the reason that the defendant, by not objecting at the time, had waived his right to object after verdict. *Baxter v. People*, 3 Gilm. 368.

In the case of *Hunter v. State*, 43 Ga. 483, a capital case, the jury read a newspaper containing a denunciation of the conduct of one of the prisoner's counsel, and it was held that as this was done with the knowledge of counsel, an objection after verdict came too late.

A great number of cases declare that if it is known to the accused that improper papers are given to the jury, an objection after verdict will be too late to be of avail. *Thompson & Merriam Juries*, § 399, and note.

In *United States v. Gibert*, 2 Sumner, 19, it was held in a very strongly-reasoned opinion by Judge STORY, that the separation or misconduct of the jury, known to the accused and not objected to until after verdict, would not entitle him to a new trial.

The subject which we are discussing received full consideration in a treatise on juries, and it was there said, in concluding a review of the authorities: "And in no case will a new trial be granted upon the ground that the juror misbehaved during the trial, unless it be made to appear affirmatively that the party complaining and his counsel did not know the fact before the jury retired to consider of their verdict." *Thompson & Merriam Juries*, § 456.

We have in our own reports many cases deciding that if objection is not made before verdict to the competency of the judge who presides at the trial, it will be of no avail. *Smurr v. State*, 105 Ind. 125; *Kennedy v. State*, 53 Ind. 542; *State v. Murdock*, 86 Ind. 124; *Fassinow v. State*, 89 Ind. 235; *Case v. State*, 5 Ind. 1. These cases establish the principle which rules here, for they proceed upon the ground of waiver by failure to make a timely objection. But more nearly resembling the present case, are those cases wherein it is held that the failure to examine jurors as to their competency or to challenge one whose incompetency is disclosed by the examination, is a waiver of the right to afterward object. *Alexander v. Dunn*, 5 Ind. 122; *Romaine v. State*, 7 Ind. 63; *Bradford v. State*, 15 Ind. 347, see p. 353; *Croy v. State*, 32 Ind. 384; *King v. State*, 46 Ind. 132; *Gillooley v. State*, 58 Ind. 182; *Achey v. State*, 64 Ind. 56; *Lockhart v. State*, 92 Ind. 452.

If a failure to object before accepting the jury is deemed a waiver,

it must logically follow that failure to object where the disqualification or misconduct of a juror becomes known after the jury are sworn, must also be a waiver, for no reason can be adduced for holding that there is a waiver in the one case and not in the other. The principle is the same in both cases, and that is that the objection must be presented at the earliest opportunity, or else it will be deemed waived. Of course this principle can have no application where the ground of complaint, whether it be the action of the court or the misconduct of the jury, is not known to the accused until after verdict, but it does apply where, as here the action of the court and the conduct of the jurors are fully known to the defendant. The principle which we have here stated was applied in *Harrington v. State*, 76 Ind. 112. In that case a proceeding for contempt was instituted against a juror who had been guilty of misconduct, and the court told the defendant that if she would consent the jury would be discharged, but she declined to either consent or object, and it was held that an objection after verdict would not be entertained. In the course of the opinion it was said: "If there was any misconduct on the part of the juror, of which she could have complained, or if there was any irregularity in stopping the trial to investigate the charge of contempt against the juror, the appellant had the opportunity to avail herself of the objection. She had the option of having the jury discharged, but she would not consent to that." A like ruling was made in *Stewart v. State*, 15 Ohio St. 155.

There are some rights which a defendant in a criminal case cannot waive, and many that he should not be asked to yield, but we do not think that the right to object to the separation of the jury before the case is finally submitted to them is one which he may not waive. The weight of modern authority is very decidedly in favor of the doctrine that the jury may, in the discretion of the court, be permitted to separate during the progress of the trial. Whart. Crim. Pl. and Pr., § 819; Thomp. & Merr. Juries, § 317.

If the matter is within the discretion of the court, then of course an accused cannot, even though he should object, complain of the ruling of the court directing a separation. Our statute clearly implies that the court may permit the jury to separate during the progress of the trial, for it provides for the charge which the court shall give them in the event that they are permitted to separate. It is quite obvious that if a separation had not been deemed proper,

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such a statute would not have been enacted. Our decisions however upon this subject are not entirely harmonious. In *Evans v. State*, 7 Ind. 271, the court quoted the statute and said: "The separation of the jury is expressly permitted, during the trial and before the cause is finally submitted to them by this statute, and of course they could not be kept in care of a sworn officer." The case cited was however criticised and partially overruled in *Anderson v. State*, 28 Ind. 22, and it was there held that it was error to permit a separation over the objection of the defendant. A like ruling was made in *Quinn v. State*, 14 Ind. 589; but it was there said that "the court may permit such a separation with, but not against the consent of the defendant." These cases agree on one point at least, that a separation of the jury during the trial is not error unless an objection is interposed. It is not necessary for us to decide whether the rule declared in *Anderson v. State*, *supra*, and *Quinn v. State*, *supra*, is or is not the correct one, for all we need do is to decide that the error, conceding it to be one, is such as may be waived. Upon this point there is entire harmony in our own cases, and as we have seen, they are in this respect supported by the very decided weight of authority. The case of *Jarrell v. State*, 58 Ind. 293, goes much farther than any of our other cases, for it was there held that the separation of the jury without objection, after the case had been finally submitted to them, was not error. Dr. Wharton makes, and with much reason, a distinction between the separation of the jury before the cause is finally submitted to them and a separation during the progress of the trial. He thus concludes his review of the authorities: "Hence it is that the weight of authority is that the defendant, even in capital cases, can legalize the separation of the jury during the recesses of the court, down to the period when the case is given them for deliberation by the charge of the court." Whart. Crim. Pl. and Pr., § 733.

[Omitting other matter.]

Petition overruled.

JOHNSON V. JOHNSON.

(106 Ind. 478.)

Will — attestation — witnesses not in presence of each other.

Witnesses to a will need not attest it in the presence of each other.

THE opinion states the case.

C. F. McNutt, J. G. McNutt, S. C. Davis and S. B. Davis, for appellants.

B. B. Rhoads, W. Mack, W. Eggleston and E. Reed, for appellees.

ELLIOTT, J. The will of Cornelius Johnson, which is here the subject of controversy, was written and signed by the testator in August, 1858, and was then attested by one of the subscribing witnesses, Daniel Budd, but it was not attested by the other subscribing witness, James Ray, until the following December, when he signed as a witness at the testator's request. The contention of the appellant is that the subscribing witnesses should have attested the will at the same time, and this presents the pivotal question in the case.

It was the common law until the change made by express statute in 1837, that it was not necessary that the subscribing witnesses should attest the will at the same time, or in each other's presence. *Jones v. Lake*, 2 Atk. 176n; *Ellis v. Smith*, 1 Vesey Jr. 11; *White v. Trustees of British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *Jauncey v. Thorne*, 2 Barb. Ch. 40.

This rule was changed by a statute enacted in 1837, which requires that the will shall be simultaneously attested by the witnesses. 1 Jarman Wills (5th Am. ed.), 254. Our statute does not in express terms require that the witnesses shall subscribe the will at the same time, but is similar to the English statute as it existed prior to the change made in 1837, and the well settled rule that a statute taken from another country shall be deemed to carry with it the construction placed upon it by the courts of that country, would seem to make it clear that it is our duty to adopt the construction given the statute by the English courts. If we yield

to this principle, then we must hold that it is not necessary that the witnesses should simultaneously subscribe their names to the attesting clause of the will. This view is well supported by authority. Following the decision in *Hoysradt v. Kingman*, 22 N. Y. 372, it was decided in *Barry v. Brown*, 2 Dem. (N. Y.) 309, that "it is an unimportant circumstance that this acknowledgment and publication were made to the witnesses on different occasions, and when they were apart from each other." In speaking of a statute very similar to ours it was said by the Supreme Court of Connecticut that "the language of our statute existing when this will was made is explicit and entirely free from ambiguity. It only requires that all the witnesses shall subscribe their names in the presence of the testator. It would give to it a strained and unnatural interpretation to extend it so as to require them all to sign in the presence of each other." *Gaylor's Appeal*, 43 Conn. 82. A similar ruling was made by the Supreme Court of Massachusetts in *Dewey v. Dewey*, 1 Metc. 349; s. c., 35 Am. Dec. 867, and in *Hogan v. Grosvenor*, 10 Metc. 54; s. c., 43 Am. Dec. 414.

The statute of Wisconsin is essentially the same as ours, and in speaking of it the Supreme Court of that State said: "It only requires that the will shall be 'attested and subscribed in the presence of the testator by two or more competent witnesses.' R. S. 650, § 2282. So far as we are aware, the cases on this subject arising under statutes similar to ours (many of which are cited in the brief of counsel for the appellant), uniformly hold that the witnesses need not attest and subscribe the will in the presence of each other. To hold otherwise would be to interpolate a provision in the statute which the legislature has not written there, and which cannot properly be implied from any thing which is written." *Will of Smith*, 52 Wis. 543; s. c., 38 Am. Rep. 756.

Without commenting further upon the authorities, we refer to some of them, merely remarking that they will be found to fully sustain the rulings made in the cases already referred to by us. *Hoffman v. Hoffman*, 29 Ala. 535; *Flinn v. Owen*, 58 Ill. 111; *Rogers v. Diamond*, 13 Ark. 474; *Oravens v. Faulconer*, 28 Mo. 19; 2 Greenl. Ev., § 676; 1 Redf. Wills, 219.

The appellant relies on two cases in our own reports, *Patterson v. Ransom*, 55 Ind. 402, and *Potts v. Felton*, 70 Ind. 166; but in neither of these cases was the point decided. In the first of these cases, there was some discussion of the question, but the case was

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decided upon another point, the court saying: "If the case turned upon this point, we should feel under the necessity of examining the authorities closely before deciding that such attestation would be a compliance with the statute." In the second case cited, the case turned upon an entirely different proposition of law from the one here involved, and of course that decision is not of controlling force here.

We fully agree with the appellant's counsel that a will must be executed in conformity to the statute. *Patterson v. Ransom*, *supra*; *Herbert v. Berrier*, 81 Ind. 1, see p. 2; *Matter of Hewitt's Will*, 91 N. Y. 261. But while we agree with counsel upon this proposition, we cannot concur with them that the will before us was not executed and attested as the statute requires.

Judgment affirmed.

PHENIX INSURANCE COMPANY V. LAMAR.

(106 Ind. 512.)

Insurance — condition against other "valid or not."

Where an insurance policy is conditioned to be void in case of "any other insurance," without consent, "whether valid or not," another policy in and of itself invalid and void, so that it constitutes no contract of insurance, is not within the prohibition, but if to avoid it requires the production of extraneous facts, it is within the prohibition.

ACTION on an insurance policy. The opinion states the case. The plaintiff had judgment below.

A. Gilchrist, C. A. DeBruler, B. Harrison, W. H. H. Miller and J. B. Elam, for appellant.

W. H. Thomas and E. M. Swan, for appellee.

MITCHELL, J. This was a suit by William S. Lamar against the Phenix Insurance Company to recover for an alleged loss by fire, under a policy of insurance issued upon the property of the former.

The policy contained this condition: "If the assured shall have or shall hereafter make any other insurance (whether valid or not) on the property herein described, or any part thereof, without the consent of this company written hereon," this policy shall be void.

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The insurance company answered that the condition above set out had been violated, in this, that the insured had prior to the receipt of the policy on which suit was brought, accepted a policy of insurance for \$500, covering a part of the property insured, which policy so accepted had been issued by the Germania Insurance Company of New York, and which remained in force at the time that in suit was taken out, and that no consent to this latter policy was indorsed on the policy in suit, or was otherwise given.

To this it was replied that the Germania policy contained a provision avoiding it, in case of the existence or subsequent procurement of other insurance upon the property therein described, unless specially agreed to in writing in or upon such policy; that at the date the Germania's policy was received, the assured held a policy for \$2,000, issued by the Home Insurance Company of New York, covering the same property, and that no consent by the Germania had been given to the policy which the assured held in the Home, and that for that reason the policy held in the Germania was and had been at all times invalid and void.

Upon demurrer this was held a sufficient reply. A recovery was accordingly had for the amount stipulated in the policy.

The reply, it will be observed, seeks to avoid the effect of the condition against other insurance, by the assumption that only such other insurance as is valid and enforceable is within the inhibition of the contract.

Since however there is put forward no claim of mistake, surprise or other circumstance which would authorize a modification of the condition, or relieve the insured from its effect, the contract, as the parties had deliberately chosen to make it for themselves, must furnish the measure of their rights. The inquiry must be, what have the parties agreed to?

In determining the liability of insurance companies, stipulations similar to that above set out have been the subject of much discussion, and not a little contrariety of opinion. There are cases in which the condition in respect to further insurance is general, the conventional phrase, "whether valid or not," being absent, which proceed upon such a construction of the contract as brings within its prohibition only such other insurance as is valid and enforceable. That other insurance has been taken by the insured, which at the time of the loss is inoperative, or voidable, so that no action could be successfully maintained for its recovery, is held in the

cases referred to, not to operate in avoidance of a policy containing the ordinary stipulation against such further insurance. Conspicuous among the later cases which adopt this view are the following. *Sutherland v. Old Dominion Ins. Co.*, 31 Grat. 176; *Fireman's Ins. Co. v. Holt*, 35 Ohio St. 189; s. c., 35 Am. Rep. 601; *Dahlberg v. St. Louis M. Ins. Co.*, 6 Mo. App. 121; *Gee v. Cheshire Co. M. F. Ins. Co.*, 55 N. H. 65; s. c., 20 Am. Rep. 171. To the foregoing may be added *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; s. c., 11 Am. Rep. 125, which in a modified form holds the same general doctrine.

On the other hand, cases which seem well supported in reason proceed upon the theory that the only purpose for which provisions of the character under consideration are inserted in policies is to protect the insurer against the hazard of over-insurance, by taking away the motive which the insured might otherwise have for the destruction of his own property. Other insurance taken without consent, whether valid or not, is held to avoid the policy in violation of which it has been taken. The assumption is that the vigilance of the property-owner will be stimulated to guard against loss by requiring him to maintain such relation to the property insured as that its destruction by fire shall not inure to his pecuniary benefit.

Such being confessedly the purpose of the contract, it is not perceived how its object is in any degree promoted by the conclusion that notwithstanding the insured may have intended to secure over-insurance, and may have firmly believed he had succeeded in doing so, it is only where the attempt is actually successful that the prohibitory condition is operative. It might be said with much reason that such a construction defeats the purpose of the provision, and renders it practically nugatory.

Moreover, to hold that only such other insurance as is not void, and cannot be avoided by extraneous facts, is within the prohibition of the contract, affords the opportunity for the anomalous spectacle of an insured avoiding the effect of apparent over-insurance, and compelling payment of one policy by exhibiting his own turpitude in obtaining another.

It is held in some cases that subsequent or further insurance, created by policies which are totally void, is no obstacle in the way of a recovery on the policy on which the claim is made. *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. If however such policies

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are voidable only for some breach of condition, for which the insurer might avoid them, they are within the prohibition against further insurance. *Funk v. Minnesota, etc., Ins. Ass'n*, 29 Minn. 347; s. c., 43 Am. Rep. 216; *Basor v. Phoenix Ins. Co.*, 4 Bush, 242; *Suggs v. Liverpool, etc., Ins. Co.*, 9 Ins. L. J. 657; *Landers v. Watertown Fire Ins. Co.*, 86 N. Y. 414; s. c., 40 Am. Rep. 554; *Bigler v. N. Y. C. Ins. Co.*, 22 N. Y. 402; *Lackey v. Georgia Home Ins. Co.*, 42 Ga. 456; *David v. Hartford Ins. Co.*, 13 Iowa, 69; *Carpenter v. Providence, etc., Ins. Co.*, 16 Pet. 495.

It is however not necessary for us to determine or further intimate an opinion upon the proper construction of a policy which simply stipulates that other insurance taken without the consent of the insurer shall render the policy void. It may well be assumed that the prevailing uncertainty and contrariety of opinion on that subject was the efficient cause for introducing into the policy sued on the phrase which distinguishes it from the policies involved in the cases referred to.

The contract is, that other insurance, "whether valid or not," taken without the written consent of the insurance company, shall render the policy void. It was thus agreed that the validity or invalidity of other insurance, taken without the written consent of the insurer, should not be the subject of future contract. Any contract of insurance, so held or accepted, was to render the policy in suit void. This agreement was not against public policy, nor prohibited by law. So far as appears, it was with a full comprehension of its terms, deliberately entered into. It is therefore to have effect according to its plain and obvious meaning. *Northwestern M. L. Ins. Co. v. Hazlett*, 105 Ind. 212; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; s. c., 34 Am. Rep. 122; *Liverpool, etc., Ins. Co. v. Verdier*, 35 Mich. 395.

So far as appears, the policy in the Germania Insurance Company was regarded both by the insurance company which issued it, and the insured, as being valid and in force at the time the policy in suit was accepted, as well as when the loss occurred. Whatever we might conclude in respect to the ordinary condition concerning further insurance, we are clear that where the parties, as in the case before us, have stipulated in their contract that other insurance, whether valid or not, shall avoid the policy, the effect of such a stipulation cannot be avoided by showing that the prohibited insurance was invalid.

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As applicable to a policy embracing a condition of that description, this general principle may be stated: If the prohibited policy, held or received by the insured, is in and of itself invalid and void, so that it in fact constitutes no contract of insurance, it will not affect the validity of that under which the claim for indemnity is made. But if to avoid it, requires the production of facts extraneous to the policy, it will be within the condition against further insurance, and unless consented to will render the other voidable. We are thus led to the conclusion that the court erred in overruling the demurrer to the reply.

A further question arising upon the evidence is suggested, but as upon the facts disclosed, it cannot be material, in view of future considerations, that we decide it, without considering that question, the judgment is reversed with costs, with directions to the court below to sustain the demurrer to the second paragraph of the reply, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

KESSEL V. ZEISER.

(109 N. Y. 114.)

Office and officer — action by officer de jure against officer de facto for fees.

One entitled to an office and ejected may, after being reinstated, recover from the usurper the emoluments received by him, although he was put in possession by a judgment of the Supreme Court.

ACTION for salary of office. The opinion states the case. The plaintiff had judgment below.

B. F. Tracy, for appellant.

Wm. B. Hurd, Jr., for respondent.

DANFORTH, J. The case shows that Moses Kessel, the plaintiff, and Andrew Zeiser, the defendant, were in the fall of 1877 rival candidates for the office of commissioner of charities in Kings county. Kessel received the certificate of election, qualified as required by law, and took possession of the office. In January, 1878, an action in the nature of *quo warranto*, in which Zeiser was joined as relator, was brought against Kessel by the attorney-general, to determine the title to the office. At the Circuit the decision was in favor of Zeiser. Kessel then withdrew from the office.

Zeiser qualified, took possession, discharged its duties, and drew its salary for a year and a half. Kessel appealed from that judgment. It was reversed in his favor. Zeiser withdrew and Kessel again took possession. Zeiser appealed to this court, where on the 17th of January, 1882, the appeal was dismissed, and in the Supreme Court final judgment was rendered in favor of Kessel. This action is brought by Kessel to recover from Zeiser the salary received by the latter while discharging the duties of the office, and he has thus far succeeded. The appeal to this court is by Zeiser.

We think the decisions lately made by us in *Nolan's* case, 101 N. Y. 539, and in *MacLean's* case, 101 N. Y. 526; s. c., 54 Am. Rep. 730, require us to dispose of this appeal in favor of the respondent. In the first, Nolan was in office by virtue of a certificate of election; in the second, MacLean was in office under an appointment duly made by the mayor of the city of New York. They discharged the duties of their respective offices, but in each of the cases we held, upon a full examination of the questions involved, that the relator, who was rightfully entitled to the office, should also recover from the defendant, as usurper, its salary. The distinction suggested in favor of the present case is more formal than real. Kessel has at all times been rightfully entitled to the office, and the fact that Zeiser was in for a short time under a judgment of the Supreme Court is of no importance, because that judgment was subsequently held to be erroneous, and the final judgment was in favor of Kessel. It was thus established that the judgment in favor of Zeiser was wrong from the beginning and his position no better than the one he occupied, when at the close of the election, Kessel was declared elected, and receiving the certificate of the canvassers, went into office. 1 R. S. 118, § 17. The final judgment accords with the adjudication of the board. Zeiser made a false claim, and it would be strange indeed if he could profit by the temporary error of the courts induced thereby.

The case is not like one where rights acquired at a judicial sale are protected. The court did not appoint to office, nor did the appellant take any thing on the faith of its order. On his invocation the court declared that he was already entitled to the office, and sought to remove the obstruction to its enjoyment. The subsequent reversal shows that declaration to have been a mistaken one, that he had in fact no title, and its effect was to leave the status of his adversary as it was before the action and himself in

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no better condition than if his claim to office had never been heard or decided by any court. Of course he can claim no advantage by virtue of the erroneous judgment. He took it at his peril. The cases cited by the appellant (*South Fork Canal Co. v. Gordon*, 2 Abb. 479; *Gray v. Brignardello*, 1 Wall. 627) do not apply. They relate to property rights which have been changed by the enforcement of a judgment, and hold that as to them the purchaser shall be protected, but even then, it is added that "the unsuccessful party in the court below shall be restored by reversal to all things which he lost by the erroneous judgment, if the title to them has not passed by such enforcement, and in such cases he is to have a right of action for a money equivalent." Here it is plain the title to the office did not pass; nor did the right to the emoluments; but if it were otherwise, the defendant would, even in that view, be required to pay the equivalent, and this, as is well settled, is the amount of salary received by him during the time he deprived the plaintiff of it. *Nolan's case, supra*; *MacLean's case, supra*.

We think therefore the appeal must fail and the judgment be affirmed, with costs.

All concur.

Judgment affirmed.

QUACKENBOS V. KINGSLAND.

(108 N. Y. 125.)

Will — dying without issue.

A will gave the residuum to the testator's son Daniel and his heirs, and in case the sons "should die without lawful issue," to the testator's other children.

A codicil gave a specific bequest out of the residuum to the testator's son James. Daniel survived the testator. *Held*, that Daniel took an absolute estate. (See note, p. 774.)

THE opinion states the case. The plaintiff had judgment at trial, which was reversed at General Term.

Nicholas Quackenbush and Geo. W. Lord, for appellant.

Charles E. Miller, for respondent.

DANFORTH, J. The plaintiffs Jane and Hannah are children, and the other plaintiffs grandchildren of Daniel Kingsland the

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elder. They brought this action against Sophie Kingsland, the widow of Daniel Kingsland the younger, who was a son of Daniel Kingsland the elder, to recover certain property theretofore given to her by him, but which, as they stated, belonged to the estate of Kingsland the elder, and to which they claimed to be entitled as devisees under his will. They succeeded at the Special Term, but on appeal to the General Term, the judgment in their favor was reversed and their complaint dismissed upon the sole ground, as stated in the order of reversal, "that they took no interest under that will." The testator, Daniel Kingsland the elder, died April 18, 1844; he left surviving, the two daughters above named, his son Daniel and his son Thorn. The will was admitted to probate May 3, 1844, and then died first Thorn, leaving four children, viz.: the plaintiffs Daniel C., Charles S., Louisa and James S.; afterward and on the 30th of September, 1841, died Daniel Kingsland the younger. The will of Kingsland the elder, after certain specific devises and legacies, provided as follows: "All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath unto my son Daniel Kingsland, and to his heirs; but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children, share and share alike." By codicil a specific bequest was given out of the residue of personal estate, to James S. Kingsland, but the question upon this appeal is unaffected by it, and turns upon the true construction of the residuary clause above set out. Upon the case made by the pleadings and findings of the trial court, that question was, whether Daniel Kingsland the younger took the residue of his father's estate absolutely. To answer it we must look for the intention of the testator, and that seems plain upon the language employed by him. It gives the remainder of his estate to his "son Daniel Kingsland and to his heirs." So far absolutely, but as this interest could not vest until his death, the testator, to provide against the consequences of a lapse, says: "In case my son Daniel should die without lawful issue," I give the estate to my remaining children. These words we must hold, upon principle and authority, relate to the death of the testator, and upon that event during the life-time of Daniel Kingsland, Jr., the latter became vested with the residuary estate and was entitled to its possession. This conclusion is required by the decisions of the courts in many similar cases. *Embury v. Sheldon*, 68 N. Y. 227; *Livingston v. Greene*, 52 N. Y. 118. In-

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deed the argument of the learned counsel for the appellant seems to concede that the words of the testator, taken in their legal sense, permit no other result, and his contention is that their meaning may be modified or changed by other provisions in the will, showing a different intent. No doubt the whole will is to be looked at as containing the intent of the testator, and one part may be made to give way to some other controlling provision (*Hoppock v. Tucker*, 59 N. Y. 202), but here we find nothing to warrant a presumption against the legal meaning of the words used in the residuary clause. The testator by his will, first, sets apart a certain sum of money in the hands of his executors, the interest of which is to be paid to his son Thorn "during his natural life;" second, gives to his daughter Jane a sum of money and a certain house and lot "for and during her natural life;" third, the same amount of money and a house and lot to his daughter Hannah "for and during her natural life." He provides also for his grandchildren an estate *in presenti*, in a certain farm, but in the event of their death he adds: "Then I give and bequeath the said farm to my son Daniel, his heirs and assigns."

The same language is used in reference to the above bequest to Thorn; if he dies "without having a child living, or lawful issue of them, then and in such case," it goes to Daniel, in these instances bestowing by fit words the use or interest upon the parents, and the capital upon the children or others, clearly limiting the property in succession; but when the testator speaks in the residuary clause, he uses no such words of qualification or limitation, no words indicating a life estate. He does not give the residue of his estate to his son Daniel "for and during his natural life," with remainder over to his children, if any, but unto him and "to his heirs." This difference in language indicates a different purpose, and supports the interpretation already given to it.

It should also be observed that under the appellants' construction, Daniel could take nothing unless a child was born to him, for their contention is that by reason of his death, although after that of the testator, the whole residuary estate belonged to them, and he is not otherwise directly provided for. We find nowhere in the will any evidence of a purpose to declare such result, nor any words restricting the right of Daniel, the son, to enjoy as his own, and dispose of as he thought proper, the entire residue of the estate of Daniel Kingsland the elder. Did the testator have in

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view the death of Daniel, with a failure of issue, at any period, however remote? Then he may be presumed to have considered that while Daniel's death at some time was certain, the contingency of issue could be determined only by that death, and we may assume he would have provided for the care and custody, if not the enjoyment of the residuary estate during that time, which we now see was extended to nearly forty years. Yet no life estate or other interest is given to any one. An authority upon the language of one will furnish little aid toward the construction of another, and the cases cited by the appellant are no exception. Thus *Douglass v. Chalmer*, 2 Ves. Jr. 501, is referred to in support of the position that the words already quoted from the codicil indicate an understanding on the part of the testator, that the residuary devise was not absolute. In the case cited, the devise of the residue was to a daughter, and afterward by codicil, the testatrix in terms gave to that daughter a diamond ring which formed part of the residue. This specific bequest was held to be inconsistent with an intention to make an absolute gift to the same person through the residuary clause, but intelligible and natural if the residue was given for life only.

In the case at bar the codicil takes away from the residuary legatee, and indicates nothing but an intent on the testator's part to bestow so much of his bounty upon another beneficiary. Nor do the cases cited upon the principal question raise any doubt, that under the language of this will, the contingency of death was death of the legatee during the life-time of the testator, and as that did not occur, the plaintiffs took nothing under the will.

The judgment of the Supreme Court was upon that exposition, and should therefore be affirmed.

All concur.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Allender's Lessee v. Sussan*, 33 Md. 11; a. c., 3 Am. Rep. 171; *Hill v. Hill*, 74 Penn. St. 178; a. c., 15 Am. Rep. 545.

The phrase "die without issue" is the subject of a chapter of some fifty pages in Jarman's work on Wills, chapter 41. The cases have been collected in note in Randolph and Talcott's edition, vol. 8, p. 297 *et seq.*, and in Bigelow's edition, vol. 2, p. 497 *et seq.*

Leaving out the numerous citations, Mr. Bigelow's note is in part as follows: "The authorities in this country are at variance upon the construction of words of this kind. In the following cases it has been declared that they must be taken to refer to an indefinite failure of issue. This in the case of realty will of course (the devise over being void for remoteness) give the first taker an es-

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life tail, and the second devisee the remainder, and in the case of personalty the fund absolutely. A contrary construction, making the words refer to the death of the testator, and thus saving the gift over as an executory devise, has been held in some of the cases, aided by slight indications of intention. The Georgia, Ohio and Kentucky courts expressly reject the English rule as to realty. It is apprehended that at the present day the construction which refers the words in question *prima facie*, to the death of the first taker will, not only in the case of personalty, but also as to realty, be favored generally in this country, and adopted upon slight indications of intention, in so far as the courts find themselves unfettered by binding authority." Of the word "survivor" he says: that although Kent thought it ought not to affect the case, yet "it is settled in New York and many other States that that word is to be understood as qualifying the technical meaning of the words, 'dying without issue,' so as to require them to read 'dying without issue living at the time of the prior taker's death.'" "So when the gift over is upon failure of issue of the first taker or upon his failing to attain a certain age, the old construction is escaped and the executory devise saved; the word 'or' being evidently meant for 'and.'" "In those States where the English construction prevails, or at least in some of them, it is also held that the construction is not escaped by the use of the words, 'without leaving issue,' or 'without leaving heirs of the body,' when not applied to personalty. Very little in addition to the word 'leaving' will at all events change the construction. It is declared that the rule should be applied in cases of realty when the first devise is to two persons, and the devise over in case of the death of either leaving no issue is not to the survivor but to a stranger. The rule in England as to gifts of personalty, which makes the word 'leaving' refer *prima facie* to the death of the prior taker, has been uniformly followed in this country." Mr. Bigelow concludes. "Nothing could be more improbable than that a testator in providing for a gift over to B, on the death of A. 'without issue,' without more particular words, should have contemplated all the time of A's possible posterity as standing before B's accession to the bounty; not indeed that it might not be perfectly natural in many cases for the testator to prefer A. and his posterity to B., but that if he really did so intend he would have been apt to say so in language which would not require straining to give it the desired meaning. It is apprehended that the meaning of the word 'issue' in the mouth of the uninstructed testator is strained when it is made equivalent to posterity. If the testator were to be questioned, it would doubtless be generally found that so far as he had any definite idea at all, he had used the word in the sense of children, living of course at the death of the first taker. The strong bias, it may be remarked, of Mr. Chancellor KENT in favor of the old (English) construction, has not been very widely shared." "And how ready the courts are to give heed to any indication, the slightest, of an intention to refer the words 'dying without issue' to the time of the death of testator, even where they still retain *prima facie* the old effect, the cases already cited abundantly show." "The truth is, these words, 'dying without issue,' are condemned by the law to be surly, rigid, inflexible and immovable, when they are alone; but if they can once be got into sensible company, they lose their gloomy, dogmati-

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cal, arbitrary disposition, and both speak and act as the rest of the company do." *Kelley v. Fowler*, Wilmut's Notes, 331.

In the recent case in the English Court of Appeal, *Ottewill v. Wright*, 24 W. R. 84, the rule was stated: Where there is a gift over in the event of death without issue the death must be held to mean death without issue at any time, unless a contrary intention appears in the will, and the introduction of a previous life estate does not alter the principle of construction. This is founded on *Mahoney v. Burdett*, 7 H. L. Cas. 408.

We append references to a few important cases in New York and elsewhere: In *Kelly v. Kelly*, 61 N. Y. 47, the court said: "The devise and bequest in the second clause of the will is absolute and quite sufficient to pass the fee, but in the fourth clause it is supposed to be qualified by the provision that 'in case of the death of either of my said children, I devise my whole estate to the survivor; and in the case of the death of both, I devise all my property, or what may then be left, to James and Michael Kelly, sons of my brother Bernard of New York, or to the survivor of them.' * * * I think it quite apparent that the death of the children referred to in the fourth clause of the will, upon which contingency the estate would go to the defendants, was a death happening in the life-time of testator, and for this construction there is much authority. *Clarke v. Lubbock*, 1 Y. & C. 482; *Origan v. Baines*, 7 Sim. 40; *Ross v. Hill*, 8 Burr. 1881; *Moore v. Lyons*, 25 Wend. 119; *Conceves v. Kellogg*, 7 Barb. 590; *Livingston v. Greene*, 52 N. Y. 124. 2 Jarman on Wills (3d London ed.), 707; (2d Am. ed., 468, 469); *Whitney v. Whitney*, 45 N. H. 311; *Briggs v. Shaw*, 9 Allen, 516. Upon the death of the testator, therefore the fee became at once vested in the two children, and the limitation over became of no effect, and the property descended to the heirs-at-law of the testator, who are the parties to this proceeding and inherit in equal proportions."

In *Embury v. Sheldon*, 68 N. Y. 327, the testator gave to A., D. and P., each one-fourth of the income of his estate with this provision, that in case of the death of A., D. or P., "leaving lawful issue surviving them," that "such issue shall take of income as well as principal the share the parent would have been entitled to if living, and should no lawful issue survive them, the share of the one so dying shall go to the survivors." Held, "that the death of a child referred to in the will meant a death during the life-time of the testator, and upon the death of the testator, D. took an absolute vested remainder in the residuary estate which passed to plaintiff under the will of D."

The court (p. 238) said "the language of the second subdivision above cited, in the absence of any other controlling provision showing a contrary intention, according to the recognized rule of construction applicable to wills, refers to a death in the life-time of the testator. *Livingston v. Greene*, 52 N. Y. 118, and cases cited. Instead of there being any such controlling provision, the last paragraph of the second subdivision appointing the executors guardians of all the minors who may become entitled to a share under the will, confirms the presumed intent. If this construction is correct, then Daniel Embury, Jr., having survived the testator, took upon the death of the latter an absolute vested remainder in the estate."

In *Crossman v. Field*, 119 Mass. 172, the court said: "The proviso that if

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the niece 'should not live,' is exactly equivalent to 'if she should die,' or 'in case of her death,' and (as she must die at some time and no other period is mentioned in the will) must apparently be construed 'if she should not survive me,' the testatrix. *Briggs v. Shaw*, 9 Allen, 516; 2 Jarman Wills, chap. 48."

In *Waugh's Appeal*, 78 Penn. St. 436, the provisions were: "I give to my sons John and James my dwelling plantation * * * with about thirty acres adjoining * * * to be divided, etc. * * * If any of them should die without lawful heir I allow the survivor to inherit the whole. The land I have bequeathed to each of them I allow them to hold by virtue of this my will to them and their heirs and assigns forever." He also charged legacies on the land. *Held*, 1. That the sons took estates in fee. 2. The clause "if any of them should die without lawful heir, the survivor to inherit the whole," meant only to provide against lapse. The court said: "We are of opinion however that the brothers took estates in fee, and that the direction 'if any of them should die without lawful heir, the survivor to inherit the whole,' meant only to provide against lapse."

In *Livingston v. Green*, 52 N. Y. 118, the testator gave his wife a life-estate and then provided that "after her death I give and bequeath all my real estate to all my children, and to their heirs and assigns, to be equally divided share and share alike, and should any of my children die and leave lawful descendant, such heirs to receive the parents' portion."

The court (p. 124) said: "The language used in the seventh clause 'should any of my children die and leave lawful heirs', in the absence of other controlling provisions refers to a death in the life-time of the testator. *Moore v. Lyons*, 25 Wend. 119 and cases there cited; *Ross v. Hill*, 3 Burr. 1881; *Converse v. Kellogg*, 7 Barb. 590. There are no other provisions in the will at war with this. "If a bequest be made to a person absolute in the first instance, and it is provided that in the event of death or death without issue another legatee or legatees shall be substituted to the share or legacy then given, it shall be construed to mean death or death without issue before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life without clear evidence of such intent."

M. bequeathed one-sixth of his estate to his son "J. M. or his heirs" and a like proportion in the same language to two other sons, and the remaining three-sixths in trust for each of his three daughters. He also directed "if either of my sons should die without leaving issue living at the time of his death, the share given to such son shall pass to and be divided among such of my children as may be then living, and to the issue of such as may be dead." *Held*, that each son had an absolute indefeasible interest in the share bequeathed to him. *Mickley's Appeal*, 92 Penn. St. 514.

The court said: "It is very clearly settled, both in England and in this State, that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death, or death without issue before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life, or what is practically the same thing,

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to be subjected to an executory gift over upon the occurrence of the contingency of death or death without issue at any future period within the rule against perpetuities, without clear evidence of such an intent. *Caldwell v. Skelton*, 1 Harris, 152; *Estate of Biddle*, 4 Casey, 59; *Karker's Appeal*, 10 P. F. Smith, 141; *Fahrney v. Holsinger*, 15 P. F. Smith, 388; *McCullough v. Fenton*, 15 P. F. Smith, 418.

"In *Jessup v. Smuck*, 4 Harris, 327, the general rule is recognized, though in that case the court, upon the construction of the whole will, thought the intention of the testator was very clear, that he meant death 'without marriage' at a period subsequent to his own death. In the will before us it is strongly contended that death without issue living at the death of the first taker evinces the same intention. But it is not easy to draw such an inference from those words alone. Mr. Smith, in his work on Executory Interests, maintains that where the gift over is not merely dependant upon death, but upon dying unmarried and without issue, the event will be construed to mean not a death generally at some time or other, but a death in the testator's lifetime if the fund or property itself, and not merely the interest or income, is given absolutely to the person whose death is spoken of. § 662."

In *Buel v. Southwick*, 70 N. Y. 581, the will of B. devised certain premises to each of his three children, C., J. and W., respectively, "and his, her or their direct lineal descendants, should he, she or they have any, in fee simple absolutely," "subject to the conditions and contingencies" following, i. e., "in the event that either * * * shall die, leaving no children or descendants of any children, then and in such case," the devise to the one so dying to go "to the children of the survivors or survivor * * * equally, share and share alike, the direct lineal descendants, if any, of such of my said three children * * * as may then be deceased to be entitled to the same share which the child or children so deceased would have been entitled to if living." B. died, leaving the said three children him surviving. C. thereafter died, without having had a child born to him. *Held*, that the death referred to was not a death during the life-time of the testator; that the devise to C. gave to him a contingent estate in fee, subject to be, and which was reduced to a life-estate by his death without children, or the descendants of any children, and upon his death the fee passed to the children of J. and W., then living.

In *Carroll v. Burns*, 15 Weekly Notes of Cases, 553, 557, the Supreme Court of Pennsylvania, January 21, 1885, held that under a devise "all the rest, residue and remainder of my estate, real and personal, I devise and bequeath unto my said three daughters, to have and hold to them during their natural lives, and after death, then to the lawful issue of my said three daughters and the heirs and assigns of such issue," that perhaps the testatrix intended to give a life estate to her daughters, and the remainder in fee to their children; but she has used words which definitely vest in her daughters an estate tail, and the courts are not at liberty to wrest them so that they may mean any thing else."

In *Vanderzee v. Hanwell*, New York Court of Appeals, October 5, 1886, testator by his will disposed of his estate, real exclusively, as follows: "First. My debts and funeral charges to be paid first out of my estate. Second. All my :

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real estate, as now in my actual possession, being my homestead farm, situate in the county of Albany, I devise to my son Cornelius, subject to the proviso hereinafter contained." * * * After providing for a life support for his wife out of the estate, the will continued: "Ninth. The legacies above mentioned are to be paid to the legatees by my son Cornelius in consideration of my devising unto him the aforementioned real estate, to be paid to them respectively within two years after my death. Tenth. In conclusion, my will is that if my son Cornelius dies without issue, that then the estate herein devised to him shall go to my grandchildren hereafter named, * * * share and share alike, and in case my son Cornelius should die before the provisions of this will become an act the devisees last named shall perform and fulfill all the conditions required of my son Cornelius to the legatees named in this my will." Cornelius survived the testator. *Held*, that the words "if my son Cornelius dies without issue" in the tenth clause, standing alone, referred to his death in the life-time of the testator which would give Cornelius an absolute fee; but taken in connection with the second clause thereof, and its context, they referred to his death without issue, either before or after the testator's death, in which event the gift over to the grandchildren was to take effect.

The court said: "The devise was in terms of all the testator's real estate in possession, and the language is sufficient both at common law and under the statute, without words of inheritance, to embrace the fee, 1 Rev. Stat. 748, § 1, and the gift over, in the event only of the death of Cornelius, without issue, furnishes the strongest ground of implication that the testator intended to vest in Cornelius a title transmissible by descent to his issue.

"It is said by Mr. Jarman, 2 Jarm. Wills, 752, to be an established rule that where a bequest is simply to one person, and in case of his death to another, the primary devisee, surviving the testator, takes absolutely. This rule applies both to real and personal estate, and so far as I know, the authorities in this country uniformly sustain the construction that where there is a devise or bequest *simpliciter* to one person, and in case of his death to another, the words refer to a death in the life-time of the testator. *Moore v. Lyons*, 25 Wend. 119; *Kelly v. Kelly*, 61 N. Y. 47; *Briggs v. Shaw*, 9 Allen, 516; *Whitney v. Whitney*, 45 N. H. 311. It is said in support of this construction that as death, the most certain of all things, is not a contingent event, but the time only, the words of contingency in a devise of the character mentioned can be satisfied only by referring them to a death before a particular period, and as no other period is mentioned, it is necessarily presumed that the time referred to is the testator's own death. See *Edwards v. Edwards*, 15 Bea. 307.

"We think this construction, although supported by somewhat refined and technical reasoning, stands more strongly, in most cases at least, upon the probable intention of the testator. It prevents the disinheritation of a testator's posterity, which would often happen if a death of the primary legatee at any time was held to be within the meaning of the devise.

"It may be safely assumed that where a will is dictated under the influence of family relations, it would seldom happen that a testator would intentionally cut off the issue of a son or daughter from taking the share of the parent in his estate, for the benefit of collateral objects.

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"There are cases of another class than the one mentioned, in which an alternative limitation, depending upon the death of a primary legatee or devisee, is also held to refer to a death in the life-time of the testator, although the cases are not within the reason upon which the construction in the class of cases first referred to is supported. One of the cases of the second class is where a devise is made to A., and in case of his death without issue, or without children, or without leaving a lawful heir, then to B. It is manifest that the event on which the gift over is to take effect is distinctly pointed out, and is uncertain and contingent, viz.: death without issue, etc., and it is not necessary, in order to give effect to the words of contingency, to refer the death to one happening before the death of the testator. So also such a construction is not necessary to prevent the disinheritorship of issue, for it is only in the event that there is no issue that the gift over is to operate.

"It is said by Mr. Jarman, 2 Jarm. 783, that the general rule is, that where the context is silent, the words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator. It will be observed that the rule, as stated by the learned author, relates to personal property and is deduced from the later English cases upon the construction of bequests of personalty, coupled with a contingency, which seem to have modified the earlier decisions. But where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has, I think, been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue, in the life-time of the testator, and that the primary devisee surviving the testator takes an absolute estate in fee-simple. *Clayton v. Lowe*, 5 Barn. & Ald. 636; *Gee v. Mayor of Manchester*, 17 Adol. & Ell. (N. S.) 737; *Woodbourne v. Woodbourne*, 23 L. J. Ch. 336; *Doe v. Sparrow*, 13 East, 359; *Quackenbos v. Kingsland*, 103 N. Y. 128; *Livingston v. Greene*, 52 N. Y. 118; *Embury v. Sheldon*, 68 N. Y. 227; *Waugh's Appeal*, 78 Penn. St. 436; *Mickley's Appeal*, 92 Penn. St. 514. But see *Britton v. Thornton*, 112 U. S. 526.

"The case of *Quackenbos v. Kingsland*, *supra*, was that of a devise by the testator of the residue of the real and personal estate to 'my son, Daniel Kingsland, and to his heirs, but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children, share and share alike,' and it was held, in exact conformity with the decisions to which we have referred, that the words referred to the death of the primary devisee in the life-time of the testator. This rule of construction in this class of cases is founded in part upon the disinclination of the courts to cut down a fee once given, except upon clear words, but rests more upon authority and precedent than reason, for it is by no means certain that it was not the intention of the testator to control and provide for the ulterior devolution of the title, after it had been enjoyed during life by the primary devisee, in case he then died without issue, and such a construction would, it would seem, give effect more completely to the language used.

"But the rule established by the courts applies only where the context of

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the will is silent, and affords no indication of intention other than that disclosed by words of absolute gift, followed by a gift over in case of death, or of death without issue, or other specified event. Indeed, the tendency is to lay hold of slight circumstances in the will, to vary the construction and to give effect to the language according to its natural import. *Buel v. Southwick*, 70 N. Y. 581; *Nellis v. Nellis*, 99 N. Y. 505; *Hennesy v. Patterson*, 85 N. Y. 92. In these and other cases, which might be cited, the court found in the context indications of intention, which took them out of the operation of the rule to which we have referred.

"We are of the opinion that there are indications in the will now before us, that the testator intended that the gift over to grandchildren should take effect upon the death of his son Cornelius, without issue, at any time, either before or after his own death, and that the rule of construction which applies to the words 'death without issue,' when standing alone, does not apply to the will in question.

"The gift to Cornelius in the second clause of the will is made 'subject to the proviso hereinafter contained.' Reading this clause by itself, we should naturally expect to find, in a subsequent part of the will, some condition modifying, in some contingency, the estate given to Cornelius, when he should take it under the will, to some condition. Looking then at the tenth clause, we find a condition or proviso which is that on the death of Cornelius without issue, the estate should go over to the grandchildren. This provision in the tenth clause, standing alone, would, according to general rules of construction, be construed as referring to the death of Cornelius, without issue, during the testator's life. But construed in connection with the natural meaning of the second clause, there is color for a conclusion that it referred to a death either before or after the testator's. But more satisfactory evidence that the testator referred to a death at any time is found in the last paragraph of the tenth clause, which declares, 'in case my son Cornelius should die before the provisions of this will become an act, the devisees last named, the grandchildren, shall perform and fulfill all the conditions required of my son Cornelius to the legatees named in this my will.'

"It seems obvious that the duty imposed upon the grandchildren by this clause was a duty to be discharged by reason of an omission or default of Cornelius to satisfy the legacies. If the only object of this clause was simply to impose upon the grandchildren the duty of paying the legacies in case the alternative gift took effect by the death of Cornelius, without issue, in the lifetime of testator, so that thereby they became primary devisees, the testator would naturally have expressed his intention in simple and clear language, as by declaring in connection with the gift over, that the grandchildren should pay the legacies, or that they should take the land subject to their payment. The phrase, 'in case my son Cornelius should die before the provisions of this will become an act,' is obscure. But it is to be observed that Cornelius had, by the terms of the ninth clause, two years in which to pay the legacies. The testator must be assumed to have had in mind two contingencies: (1) That Cornelius might die before him, without issue, or (2) after him, but within the two years, and before he had paid the legacies.

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"The last paragraph of the tenth clause was inserted, we think, to provide for both contingencies, and the burden of paying the legacies was imposed upon the ulterior devisees, in case of the death of Cornelius, either before the testator, or after his death and within two years, in case the direction for their payment should then be unexecuted. If this is the fair construction of the clause, then it is clear that the words, 'death without issue,' referred to a death at any time, because it is inconceivable that the testator could have intended that the grandchildren should pay the legacies, except in the event of their taking under the devise. The clause is not that in case Cornelius dies before the will takes effect, then the grandchildren shall pay the legacies, but 'in case he dies before the provisions of this will become an act,' i. e., before he shall have paid the legacies. The legacies were an equitable charge on the land. *Harris v. Fly*, 7 Paige, 422. The fact that they were also personally charged on Cornelius does not, we think, require us to hold that he took a fee-simple. The circumstance that a devisee is personally charged with the payment of legacies is a fact resorted to in doubtful cases, in aid of the construction of a devise, but is never decisive where a different intention is disclosed."

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(102 N. Y. 135.)

Tenants in common — allowance for repairs and improvements by one.

On partition of land held in common, one tenant may be reimbursed for necessary repairs and improvements made at his expense.

PARTITION. The opinion states the case.

Arthur Moore, for appellant.

David H. Carver, for respondent.

FINCH, J. The facts of this case develop a question not in all respects easy to answer. The defendants were tenants in common with one Whitaker of a mill property badly run down and out of repair. Their share was an undivided half. On a judgment against Whitaker his interest was sold, the defendants becoming purchasers; but subsequent judgment creditors redeemed and acquired the title of the debtor, and became by relation and through their redemption vested with the right of the debtor from the date of the sale, and thereby tenants in common with the defendants

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from that date by relation, or vested with the right of such a co-tenant. During the fifteen months between the sale and redemption, the defendants expended a large amount upon the mill. They effected changes of two kinds, distinct in purpose and character.

The grist-mill was originally both a custom and merchant mill and provided with machinery for both uses. During ten years immediately preceding defendants' ownership the latter use had been abandoned, and the machinery appropriate to it, by neglect and disuse, had become practically worthless, and further passed beyond the utility of repair by new inventions and appliances which made the old antiquated and ineffective for the demands and competition of business. The machinery necessary to the use of the mill for custom work had been steadily run, but become dilapidated and inefficient. In this emergency the defendants made both repairs and improvements. The referee who inquired into the situation reported upon the basis of that discrimination. The repair of the dam, the substitution of a new water wheel, the change in the machinery necessary to make the mill do good custom work he classed as repairs; while the addition to the buildings and the introduction of new machinery and appliances for a merchant mill he classed as improvements. These repairs and improvements largely increased the market value of the property. Before they were made a generous estimate of that value did not exceed \$8,000, while on the sale in partition it brought about double that amount. The proceeds of that sale are now to be divided by a court of equity in an action brought by the tenant out of the actual occupation, and the manner and proportion of that division is the question to be determined.

The execution sale, and the attitude of the defendants as purchasers under it, appear to us immaterial to the inquiry, but in some manner to have confused and complicated it.

[Omitting this point.]

We may first approach the question on principle, and reason about it from the standpoint of justice between the parties. The courts below have denied to the defendants any allowance, either for repairs or improvements. Practically they held that the defendants were foolish and the plaintiffs entitled to a dividend out of that folly, and so that the money of the former must go into the pockets of the latter. If this be true, the situation of the defendants was a hard one, though without their fault. They

owned an undivided half of the property and that certainly was no sin. The right of their co-tenant Whitaker had been sold and bid in by them. They could not be expected to bring partition until they knew that it would be needed, and for fifteen months they must allow their own property to remain out of repair and growing rapidly worse; its business and custom to drift off into other hands, and suffer a severe loss without fault of their own; or else give one-half of their expenditure, as represented by increased value, to the representatives of the party who was unfortunate. To a share of that increased value neither the debtor nor his creditors have any equitable right. They never earned it nor paid for it. If the redeeming creditors get the full one-half of the value of the property as that value exists, unincreased by the improvements, they get every dollar to which they have a just and equitable right. The rule which takes from one co-tenant the fruit of his thrift and enterprise and adds it to the unthrift and neglect of the other; which loads upon industry and ability the losses and burdens of idleness or ill-fortune; which ties up property from improvement and looks contented upon rot and decay, is a rule which sometimes the rigid and inelastic jurisdiction of a court of law may adopt from necessity, but is without excuse in a court of equity in which this action is pending. *Hewlett v. Wood*, 62 N. Y. 75.

Those courts almost, if not quite without exception, have recognized the rule that a co-tenant asking their aid for a partition against an owner who has made improvements upon the property is entitled to relief only upon condition that any equities thereby arising shall be taken into account, and that in such case, where actual partition is made and it is possible so to do, the improving tenant will be awarded the portion of the land upon which the improvements have been made. *Town v. Needham*, 3 Paige, 545; s. c., 24 Am. Dec. 246; *In re Heller*, 3 Paige, 199; *St. Felix v. Rankin*, 3 Edw. Ch. 323; *Conklin v. Conklin*, 3 Sandf. Ch. 64. This relief is administered, not upon the ground that the improving tenant who acts without the agreement or assent of the other owners gains a lien upon the property for his advances, but stands upon the proposition that one who seeks equity must do equity, and that the tenant out of the actual occupation who asks a court of equity to award him partition is entitled to relief only upon condition that the equitable rights of his co-tenants shall be respected. *Taylor v. Baldwin*, 10 Barb. 582; *Swan v. Swan*, 8 Price, 518.

This doctrine is not at all disputed in *Scott v. Guernsey*, 48 N. Y. 106, upon which the respondent mainly relies and which undoubtedly dictated the conclusion of the General Term. That case does decide that the bare fact of improvements made does not, by itself, irrespective of their character and of the circumstances under which they were made, and their effect upon the property, necessarily give a right to an equitable allowance; and to that doctrine we fully accede. Every case of the kind must be determined upon its own facts and surroundings, and those may occur in which such an allowance would be unjust and inequitable. The opinion in *Scott v. Guernsey* points out that in the cases decided in this State there was some peculiar circumstance out of which the equity arose beyond the bare fact of improvements made. In one there was trace of a consent of the other owners; in two there was mistake as to the title, the tenant improving, supposing himself to be sole owner; in a fourth the relief was against an idiot who had damaged the common property. The court then decided that in the case before them the improvements made drew with them no equitable right to compensation. They were made "as a venture," without necessity or adequate explanation, and purely as a new source of profit; they were made not as co-tenant, but during an estate for life and under "a special agreement with the tenant for life;" the owner of the improvements "received full compensation for his expenditures" and did not offer to share with the co-tenants any part of the rents received. Here were reasons enough for denying any equity to the improving tenant, and the case stands solidly upon its facts and is not open to criticism. But it does not deny the duty of a court of equity in a proper case to give its relief upon condition of an allowance for improvements, and does not undertake to specify all the cases in which such equity shall be recognized. Nor shall we undertake any such dangerous or impossible effort. The authorities leave us at liberty to consider whether, upon the facts and circumstances of this particular case, the improving tenant ought to be protected, and furnish us the power to grant the protection if it may justly be demanded.

We have already stated the facts. The situation of the defendants at the date of the execution sale was peculiar. They had bought one-half of what had been both a custom and a merchant mill. In both respects the property was so utterly out of repair and so destitute of needed machinery as to be almost useless and

profitless unless serious expenditures were made. The share of the co-tenant was sold on execution, and they bid it in, but fifteen months must elapse before they could get a title. Here arose the peculiar emergency. Were they bound to leave their property idle and a prey to rust and rot, and see the business contemplated go elsewhere without possibility of reclamation? Was anybody to be benefited by such waste and unthrift? Or was anybody to be harmed by putting the mill promptly in repair? The defendants acted in the presence of a peculiar and unusual emergency; they acted in entire good faith; the repairs were necessary and not merely a venture or speculation, and the improvements were in the line of restoration and not of new and strange enterprise. What they did was natural and normal to the use and character of the property and such as joint owners of equal ability might be expected to join in making. They offer to share in the increased income thus secured, and in every respect appear to have acted fairly. What now is the situation of the redeeming creditors? The learned counsel figures out a loss to them if they do not share in these improvements. But those figures clearly indicate that the redemption never would have been made if the property had not been improved, and that the redemption was born, not of a purpose to get the debtor's interest in the property alone, but to add to that one-half of the increased value put upon it by the other owners, and profit by their folly. The plaintiffs looked on in silence while the emergency pressing upon the defendants drove them into action, and redeemed when they thought themselves sure of the improvements. If they have an equity which neutralizes that of the plaintiffs, I am unable to appreciate it. For these reasons the case should go back for a division of the proceeds on the principles stated and for an accounting of the income and profits which the defendants offer to make. In that accounting defendants should be credited with the share of taxes paid for the benefit of their co-tenants (*Hitchcock v. Skinner*, Hoff. Ch. 21; *Van Horne v. Fonda*, 5 Johns. Ch. 389, 407), but not for insurance paid, unless for some reason which the case does not disclose.

The trial judge correctly held that the inchoate dower right of Mrs. Whitaker remained in the plaintiffs' undivided half of the property, but was discharged as against the defendants' undivided half; but in distributing the proceeds of sale the value of that

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remaining and undischarged dower right should be charged upon and paid for, solely out of the share awarded to the plaintiffs.

The judgment must be reversed, and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

WHITEHEAD V. NEW YORK LIFE INSURANCE COMPANY.

(108 N. Y. 142.)

Insurance — life — husband for wife — rights in.

A husband who has procured a policy of insurance on his life for the benefit of his wife and children may not surrender it, without their assent, while it is in force, but if it has become forfeited for non-payment of premiums, he may thereafter surrender it.

The non-payment of premiums after surrender of a policy in force will not effect a forfeiture as against the beneficiaries who are ignorant of the surrender.

ACTION to set aside a surrender of three life insurance policies. The opinion shows the case. The plaintiff had judgment below.

Wm. B. Hornblower, for appellant.

C. Elliott Minor, for respondent.

FINCH, J. All three of the life insurance policies sought to be revived and enforced in this action purport on their face to be contracts with the wife as the party assured, and not at all with the husband, who stands in the policies as simply the life insured, his conduct and death furnishing the contingencies upon which the liabilities of the insurer are made to depend. As the relation was tersely described on the argument, the contract is about the husband but not with him. He therefore in procuring the policies to be made, in paying the premiums, in receiving and acting upon notices, and in doing whatever was necessary to perfect and continue the rights of the assured, must stand in the attitude of an agent, acting for and representing the assured (*Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283); and as having no interest in the policies, unless possibly after the death of all of the assured. And

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it makes no difference that they have been kept in total ignorance of the existence of the policies for their benefit until after the death of the insured, for their claim to the fruits of the insurance must necessarily be a ratification of the acts by which it was obtained. The wife therefore in this case had a vested interest in the policies at the moment of their delivery to the insured by force of the statute which permitted them to be made in their existing form. Laws of 1840, chap. 80. Prior to that enactment and at common law it was open to question whether the wife and children had an insurable interest in the life of the husband and father (*Bliss on Life Ins.*, § 10; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516), and whether he could protect them save by taking out policies in his own name, and for the benefit of his estate which in the end would go to them. But this made the insurance liable for his debts, and left it impossible for those who needed assistance most to obtain it at all. *Ruppert v. Union Mut. Ins. Co.*, 7 Robt. 155, 156. The statute was intended to and does remedy the difficulty. It expressly authorizes the wife and children to insure the life of the husband and father, and hold the provision without liability for his debts, and the policies here purport to have made exactly that contract. They created a vested interest in the wife, and one also in the children, by force of the clause providing for payment to them if the wife should die before the maturity of the policy. It is true that one of the policies, that in the case marked A, uses the word "heirs" instead of children, and much of the appellant's argument is founded upon that fact. But the conclusions which we have reached as to policy A make that difference unessential, and permit us for the purposes of the discussion to treat the word "heirs" as meaning children, and all the policies as alike in that respect. So that the wife held the insurance for her own benefit, if she survived her husband, and the children, if she died before him. These persons were the assured, with whom through the husband as agent the contract was made, and they acquired and held their ownership irrespective of the question whether the policies had been actually delivered to them.

Such actual delivery, as a necessary condition of their interest and ownership, is argued here; and one case in this State is cited as authority for the doctrine. *Bickerton v. Jaques*, 28 Hun, 119. But the policy in that case was taken out by Jaques and made payable to his sister, and so was not issued under the act of 1840,

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and was unaffected by it, the court expressly in its opinion adverting to that fact. The interest and ownership of the wife and children in a statutory policy is further indicated by the law relating to its assignment. The cases which hold that the wife cannot traffic with her policy, by assignment or otherwise, go upon the basis that she is owner, but rest the prohibition upon the character of the property as a provision for orphanage and widowhood; and the statutes permitting an assignment by her, under careful and restrictive provisions, necessarily recognize her interest and ownership as supporting the transfers allowed. The case of *Olmsted v. Kryes*, 85 N. Y. 593, recognizes this right of the wife to the fullest extent. The whole argument of that case proceeds upon the theory that the assured, when the policy is made payable to her, or as in that case, to a trustee for her, becomes sole owner, and but for the statute regulations, could dispose of it as she pleased. Upon her death the ownership of the policy was held to vest in the husband by the usual marital right over the wife's property, and his interest was founded upon hers. We have seen that in these cases the action of the husband is as agent, and hence a delivery of the policy to him is a delivery to the wife for whom he acts, and the manual possession of the papers by her cannot be essential to her right.

These policies therefore, at the moment of their execution, vested in the wife and children as the assured under the provisions of the statute. Their interest was in the whole contract and not merely from year to year, and so far only as it was executed. *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24. They had the right, if the husband failed to pay the premiums, to pay them themselves and so continue the policy in force. It is a necessary result of this ownership that the husband could not, without the assent of the assured, surrender the policy to the company. *Stilwell v. Mut. Life Ins. Co.*, 72 N. Y. 383; *Bliss Life Ins.*, § 348; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157; *Chapin v. Fellowes*, 36 Conn. 132; s. o., 4 Am. Rep. 49. His act in so doing is not within the scope of the authority inferable from his taking out the policy, and is repudiated instead of ratified by the claim of the assured founded upon it. It follows that the action cannot be defended upon the ground of such surrender, or through any rights thus obtained. The plaintiffs are entitled to treat that obstacle as removed, and to have possession of their policies unless barred by some other reason.

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Such other reason is alleged to be the forfeiture of the policies through non-payment of annual premiums as they fell due, and these omissions raise the remaining questions in the case. Policy A, in December, 1874, and five months before the attempted surrender, was forfeited by its terms on account of neglect to pay the annual premium then falling due. The usual notice of its amount and of the dividend which might be applied upon it was given to the insured, to whom alone it had been previously sent, and who was certainly the agent of the assured, for the purpose of receiving such notice and paying the premium about to mature. While at that time such notice was not commanded by statute, it was required by and might justly be expected from the settled custom and habit of the insurer. In exact accord with that habit and custom it was given, and if a demand of the premium was needed, it amounted to such demand. There is therefore as to policy A no answer to the forfeiture unless it be in the suggestion upon which the General Term relied that such forfeiture was waived by the agreement of surrender. That agreement, it was argued, treated the policy as valid and subsisting and so waived the existing default. We do not agree to that conclusion for several reasons. The plaintiffs stand here repudiating that surrender and insisting that it is fraudulent and void, and at the same time seeking a benefit under it as a revival of their forfeited policy. They would set it aside where it harms them and maintain it where it helps them. In so doing they utterly pervert the true nature of the transactions. That was an effort, not to revive the policy, but to kill it more effectually than ever, and so understood on both sides. It indicates no waiver by the company of existing rights, but an attempt to acquire an added right and a new and further defense against liability. The forfeiture had relieved them from liability, but the policy itself was outstanding and might expose them to the appearance of a claim and a consequent litigation, and they paid something to secure its possession as a voucher and its final cancellation. The act was not in the least inconsistent with a position held and maintained, that the policy was valueless and unenforceable as an obligation, any more than that one who has a good title to real estate can be said to admit that he has none, because he bought in for his safety and security a possible hostile claim which he did not deem valid. There is no proof in the case that the payment made to the father was in fact, or was called or

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deemed, a surrender value of the policy, so as to involve an admission of its vitality, beyond a marginal note in the receipts which is purely formal and might have been explained if excluded evidence had been admitted. On the contrary, our attention is called to the very smallness of the amount paid in comparison with the premiums received as indicating that a fair surrender value was not given, and that the company made a rapacious and unjust bargain; and as to what was said and understood at the time, the door was closed by the objection of the plaintiffs and a ruling in their favor excluding the offered proofs. We see no justification for that ruling. The evidence was not admissible on the ground of agency, but when the plaintiffs rely upon the act of the company as a waiver it is vitally important to know just what that act in truth was, and how and why the form of receipt came to be used. In the light of this ruling we are bound to assume that the defendant company might and would have proved that at the time of the surrender the insured was expressly told that the policy had lapsed and forfeited; that the company stood upon its rights; but that if the insured would give up possession of the policy, they would give him a certain moderate sum as an act of kindness to an old agent of the corporation, and in recognition of an imperfect moral equity incapable of enforcement, but having about it a sort of rude justice. The company was a mutual one. For many years the insured had paid his premiums until poverty and misfortune occasioned a default. Everybody feels the force with which the situation appeals to generous and kind treatment. The companies have felt it and the legislature also. The former have adopted what they call non-forfeitable policies, and the latter has legislated in the same direction. Indeed the Federal Court, with some formidable dissent, have recognized that equity, where a forfeiture had occurred by reason of war making payment impossible, as sufficiently strong and definite to be enforced in the courts. *N. Y. Life Ins. Co. v. Statham, supra*. The pressure of that inchoate equity, even where the assured or their agent had been in fault through the non-payment of premiums, the defendant might well and justly recognize; and if it did, and paid a gratuity for that reason, the act stood expressly upon the lapse of the policy and cannot be tortured into an admission of its vitality.

It is obvious also, that if in any sense the insurer can be said to have recognized the policy as a valid and subsisting obligation, it

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was a conditional and not an absolute recognition. It was conditioned upon the surrender, and made solely for that purpose. It is not the least doubtful, that but for the agreement to surrender, no sort of admission would have been made of the existing validity of the policy. Nobody tells us what conversation occurred at the time, but the transaction itself leads to the inevitable inference that the waiver, if it can be deemed such, was conditional upon the surrender and cancellation of the policy; and the plaintiffs cannot avail themselves of the waiver which their agent secured, and repudiate the terms and conditions upon which alone he secured it. *Baker v. Union Life Ins. Co., supra.* For these reasons we are of opinion that there should have been no recovery upon policy A.

The situation as to the other two policies is different in the very important particular that neither of them were forfeited when the surrender took place; and the failure to pay annual premiums occurred thereafter. As to these omissions, two things happened which by possibility may have prevented such payments by the assured, and for which the insurer was accountable. No notices were sent either to the insured or to the children, and the company, by the wrongful possession and cancellation of the policies, and by their agreement of surrender, did an act, the tendency and purpose of which was to prevent future payment by the parties interested. If the company had refused to buy in the policies of the insured, except with the consent of the assured, one of two things would certainly have taken place. Either in view of their father's embarrassment, the children would have consented to the surrender, taking as their own the surrender value which belonged to them, or they would have kept the policies in life by themselves paying the premiums. Such action by the company on the line of its clear duty would have left the insured without the least motive for concealment of the situation from the children, and in all human probability have given them a knowledge of their rights. But the agreement of surrender practically bought the father's silence. The result shows it. He kept the secret during his life because he had in his pocket what belonged to his children and not to himself, and left the information in a letter found after his death, showing the duplicity of his dealing in the transaction. His conduct operated as a fraud upon the assured, and in that fraud the insurer participated, with a full knowledge of the probable

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consequences. The company cannot depend upon a default to which its own wrongful act contributed, and but for which a lapse might not have occurred. *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516; s. c., 29 Am. Rep. 200. The company kept the secret on its part, and now cannot set up as a defense the non-payment of premiums which it did not intend or expect to receive, and which it may justly be said to have occasioned by its own unauthorized act.

Nor should the recovery on these two policies be limited to the surrender value. That would add the sanction of the court to the unauthorized surrender, and make it valid, leaving only an action for the surrender value. More than that was the interest of the assured, and greater than that their loss by the unauthorized act. They can only obtain full redress by a recovery of the amount insured, less the unpaid premiums and interest.

The judgment should be reversed and a new trial granted, costs to abide the event, unless the plaintiffs stipulate to deduct from the judgment the amount recovered upon policy A, in which event the judgment is affirmed, without costs to either party in this court.

Judgment accordingly.

All concur.

HAT SWEAT MANUFACTURING COMPANY V. REINOEHL.

(102 N. Y. 167.)

Patents — jurisdiction of State court to prohibit use pending suit.

In a suit by the owner of a patent against a licensee for breach of contract to pay royalties, a State court may not restrain the defendant from the use of the patent during the suit.

THE opinion states the case. The injunction was granted below.

Geo. Wilcox, for appellant.

Edward S. Rapallo, for respondent.

MILLER, J. This is an appeal from an order of the General Term, affirming an order of the Special Term, granting a tempo-

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rary injunction restraining the defendants from manufacturing, selling or using certain alleged patents known as "hat sweat bands," until they pay the royalties claimed to be due by virtue of a license issued to them.

The material allegations in the complaint are as follows: That by virtue of certain letters-patent, the plaintiff has the exclusive right to manufacture and sell the article in question; that having such right it licensed the defendants to manufacture and sell the same; that in consideration of such license, the defendants promised to make monthly reports of the number manufactured by them and pay certain license fees; that they refuse to report or to pay the said fees.

The injunction was granted on the ground "that it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendants restraining the said acts, and that their commission and continuance pending the action will produce injury to the plaintiff."

The plaintiff's claim rests upon the contract entered into between it and the defendants, by virtue of which the defendants were licensed to manufacture and use the sweat bands which are the subject of this controversy. The defendants claim that they were induced to sign said contract by fraudulent representations, and that upon discovering the fraud, they repudiated the contract. Several suits have been brought for license fees due prior to February 1, 1885, and in each of these suits the defendants have answered, among other things, denying the allegation in the complaint that the plaintiff was the owner and proprietor of the letters-patent set forth therein. They also set up that the contract was obtained by false and fraudulent representations, that all the patents were good and valid, and that the plaintiff had the exclusive right to the use of the same; that the same had been confirmed by decisions in the United States courts, and that plaintiff made other representations showing title to said patents; that relying upon such statements and representations and being deceived thereby, the defendants executed said contract.

From the affidavits read upon the motion to continue the injunction, it is apparent that the question as to the validity of the patents and the right of the plaintiff to the exclusive use of the same is the subject of controversy to be determined in the action. The defense interposed involves the question whether the plaintiff

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had title to and was the owner of the patents in reference to which the contract was entered into.

It also appears from the affidavits of the defendants, used upon the motion, that they are perfectly responsible and able to pay any judgment that may be recovered against them.

In *Continental Store Service Co. v. Clark*, 100 N. Y. 365, it was held that while a State court has jurisdiction to decide questions as to the title to letters-patent granted by the Federal government, or of an action on a contract, although such action involves the validity of a patent, it has no authority to restrain a party from using the patent *pendente lite*, or in any way to pass upon a question as to an infringement of the patent right; as to this, the Federal courts have exclusive jurisdiction. Within the rule laid down in the case cited it is manifest that no jurisdiction existed to grant the injunction against the defendants, and that the remedy of the plaintiff by injunction was vested exclusively in the United States courts.

In the case cited the action was brought to compel the specific performance of a written agreement, under seal, and to remove a cloud on the title of the plaintiff to certain property, manufactured by the plaintiff by virtue of the written agreement and as assignee of the same and of certain patents therein mentioned, and to prevent respondents from using the patents *pendente lite*. It is said in the opinion that "a State court cannot grant relief beyond its jurisdiction, as an incident to other relief which is within its power. It may determine what the contract is and in whom the title to the patent is vested, but it has no right to say that a party shall be enjoined from using the patents, or in any way to pass upon any question arising as to its infringement."

We are unable to perceive any difference between the case cited and the one at bar, and no reason exists why the former is not controlling and decisive of the question now presented. It is also apparent that the plaintiff had an ample remedy at law by an action upon the contract for the recovery of damages for the failure of the defendants to perform the same. Several of these actions have already been commenced, and there are no such features in the case now considered which entitle the plaintiff to the benefits arising from the injunction in enforcing its rights. The defendants are, as the proof shows, perfectly responsible, and any judgment recovered against them can be collected. Inasmuch however, as the case

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may be disposed of upon the question as above considered, it is not necessary to determine whether the injunction should be dissolved upon the ground last stated.

The order of the General Term and of the Special Term should be reversed, and the injunction dissolved.

All concur.

Ordered accordingly.

MATTER OF APPL'N OF MCMAHON V. PALMER.

(102 N. Y. 176.)

Taxation — of national banks.

In the assessment of shares of national banks in a city, when the owner does not reside in the ward where the bank is located and has no real estate therein, the assessment may be made upon a special list, although the owner lives and is assessed for personal property in another ward.

The mere fact that some corporations, or some personal property, are subject to a less rate of taxation than banks, will not vitiate the law imposing taxes upon bank shares, unless it clearly appears to be the legislative intent to effect discrimination against them.

The provisions of the act, authorizing proceedings to punish for misconduct in refusing or neglecting to pay a tax upon personal property, are not unconstitutional.

A PPEAL from order directing the commitment of the defendant until he shall pay the amount of a personal tax imposed upon him, with costs, etc. The opinion states the facts.

William Hildreth Field, for appellant.

D. J. Dean, for respondent.

RUGER, C. J. Upon an application by the receiver of taxes of New York to the Court of Common Pleas, the appellant was adjudged guilty of misconduct in refusing to pay the tax assessed upon his personal property for the year 1881, and a fine was imposed upon him therefor. The proceeding was had under the provisions of chapter 230, Laws of 1843, and was conducted in conformity therewith. The tax in question was predicated upon the customary annual assessment of property, liable to taxation under the general laws of the State, but was in this instance based upon an assessment of the value of national bank shares owned by the appellant. The number of shares so owned by the defendant,

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and the estimated value thereof, was furnished by him to the assessment officers, and upon the information thus obtained, with that derived from other sources, said shares were appraised at their actual value, and the amount thus assessed was placed in the lists provided for the enrollment of property of that description. Certain irregularities are alleged to have occurred in the proceedings for the assessment of the property which it is claimed were jurisdictional in character, and ought to render such assessment invalid and the tax levied thereon void.

It is quite true, if any act which was required by law to be performed by the assessment officers, and which is made thereby the condition of a valid assessment, has been omitted by them, it will render the assessment void. We have been unable however to find any such irregularity in the proceedings. Those claimed to exist are the following :

[Minor points omitted.]

It is also claimed that the entry of the assessments for national bank shares, upon a list or book separate from other assessments for personal property against individuals in the city renders such assessment void. It is provided by section 3, chapter 596, Laws of 1880, that such "shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank, banking association or trust company is located and not elsewhere, whether the stockholder resides in such place, city, town or ward or not." Sections 4 and 5 of chapter 410 of the Laws of 1867 provide for the assessment of personal property in the city of New York upon separate rolls from that of real estate. In the General Laws of the State the personal property of an individual is required to be assessed against him in the place of his residence, and the assessments of real estate follow the location of such property.

It must follow as the necessary consequence of these requirements, when the individual assessed does not live in the same ward in which the bank is located wherein he owns shares, and does not own real estate therein, that his assessment for bank shares must be made upon lists especially prepared for that purpose, in the ward where it is located, or the property must altogether escape assessment and taxation. The familiar rule that a statute must be so construed as to give it effect and to avoid a result which would render it inoperative, if it be reasonably susceptible of such an in-

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terpretation, would seem to require us to sanction the only mode of assessment which seems capable of securing the benefits designed by the statute.

It is also clear that the tax payer has not been deprived of any substantial benefit by the mode thus pursued. The statute gives information to him of the place where the roll is to be deposited for examination, and the length of time during which it is to be there kept for inspection, and of his opportunity during such time, to apply to the proper officers for the correction of any errors which he may find in his assessment. Not only this, but the commissioners of taxes and assessments are also required to advertise the fact of the completion of the annual record containing all assessments upon property in the city of New York, and the time when the same will be ready for inspection by tax payers, and to keep the same in the tax commissioner's office, open for that purpose, from the second Monday in January to the thirtieth day of April thereafter. There is no complaint but that these requirements were complied with, or but that the appellant had actual notice of the assessment in question, in ample time to procure its correction if any error existed therein; in fact it affirmatively appears that the relator did appear before the commissioners of taxes on the 12th day of April, 1881, and made affidavit upon which he procured a substantial reduction of the assessment in question. *Matter of De Peyster*, 80 N. Y. 565; *Matter of Lowden*, 89 id. 548.

It does not appear that there is any provision of law requiring the assessments of individuals for bank shares in New York to be made otherwise than in the mode adopted in this case, and in the absence of such provisions we do not see why the practice here pursued was not in harmony with the general regulations applicable to the subject, and did not afford to the appellant the same opportunity for correction and notice of the assessment in question that was given to all other tax payers of similar assessments in New York. There is nothing in section 5219 of the Revised Statutes of the United States, which either impliedly or expressly condemns the mode of registering the assessment adopted in this case. The section provides that nothing contained in that act shall prevent the shares owned by an individual in a national bank from being included in the valuation of his personal property in assessing taxes imposed by the authority of the State in which the bank is located. The mere ministerial act of the officers in estimating and noting

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the result of the judicial determination, as to liability of the individual, and the value and assessability of his personal property, provided such act does not produce an inequality of assessment, are not affected by the provisions of the section. The section purports only to affect the judicial act of the assessors in including the value of bank shares in the assessments of property and not to regulate its exercise except in respect to the rate of taxation and assessment adopted. The provisions pertaining to the assessment of bank shares in New York are essentially different from those considered by Judge WALLACE in *Albany City Bank v. Maher*, 19 Blatchf. 174. The views there expressed are inapplicable to the modes of assessment prescribed in the city of New York, and applied only to cases where the assessment of both real and personal property is required by the statute to be made on the same book or roll. The views we have expressed are sustained by the decisions of this court in *Foster v. Van Wyck*, 2 Abb. Ct. App. Dec. 167, and also by *Williams v. Weaver*, 75 N. Y. 30, which in this respect was unaffected by the subsequent proceedings in that case. There are no other objections affecting the regularity of the proceedings for assessment, which are of sufficient importance to merit notice.

It is further objected by the appellant that "the system of taxing the appellant's national bank shares resulted in taxing the moneyed capital invested in them at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of this State invested in other investments." The particular ground upon which the appellant bases this point is the claim that "there is no law upon our statute books for the taxing of shares of stock of railway companies, street railways, ferry and canal companies, fire and life insurance, trading and other miscellaneous companies, and the deposits in savings banks." This claim seems to be unfounded in fact. Careful examination of the statutes and a comparison of the burdens laid upon the property, capital and business of the people under the laws of the State will show that the money invested in national banks is subject to no greater burden than that imposed upon other species of assessable property. Capital invested in national banks is taxable only upon the individuals owning shares therein, and for the purpose of such taxation is assessable like all other personal property liable to taxation in the State, at its actual value. Such shares were originally made assessable by chapter 761 of the Session Laws of 1886, under the authority of the act

of Congress, section 5219, which expressly permitted such assessment, subject only to the restrictions "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," and that the shares of such stock owned by a non-resident of the State shall be taxed in the city or town where the bank is located, and not elsewhere. The act of 1866 was amended by chapter 596 of the Laws of 1880, and chapter 477 of the Laws of 1881, so as to authorize the allowance to a tax payer upon bank shares of all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of the State. The only result of this legislation has been to bring the capital invested in national banks within the taxing power of the State and place it on terms of equality, with reference to general taxation, with all other assessable personal property therein. The general laws of the State require all property, both real and personal, no matter by whom owned, except in certain cases of special exemption, to be assessed for purposes of taxation. This requirement embraces all the property owned by individuals as well as corporations, and includes all shares of stock held by individuals in corporations, except in cases where the capital stock of such corporations is itself liable to taxation as against the corporation. §§ 1, 2, 3, 4, 5, 6, 7, pp. 981 and 982, R. S. (7th ed.) ; § 1, p. 1036, R. S. (7th ed.). By special provision of law all assessments upon capital employed in banking corporations, whether National or State, are required to be made in the same manner and to have in view the placing of these institutions on terms of absolute equality. Chap. 140, Laws of 1880. The various railroad, ferry, canal, manufacturing and other industrial corporations referred to by the appellant are not only liable to taxation, either upon their capital stock, or upon their shares held by individuals which are substantially the equivalents of each other, but are also subject to contributions from their gross receipts, taxes upon franchises and other impositions from which bank capital is altogether exempt. Chap. 456, Laws of 1857 ; chaps. 534 and 542, Laws of 1880 ; chap. 477, Laws of 1881 ; § 7, p. 982, R. S. (7th ed.). Our system of laws with reference to the taxation of incorporated companies, and capital invested therein, has been carefully framed with a view of reaching all taxable property and subjecting it to equality of burden so far as that object is attainable in a matter so complex.

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In view of the wide variation in the employable value of such investments, and the frequent mutations in their conditions, it is by no means certain that this object has not been attained with reasonable accuracy. It is quite clear from even this cursory review of the statutes that if any discrimination is made by our laws in taxing capital invested, it is not to the prejudice of that employed in banking corporations.

Even if this were not the result of the statute, we are of the opinion that investment in the shares of the companies named does not come within the meaning of that clause in the Federal statutes referring to other moneyed capital in the hands of individuals. That phrase, as generally employed, distinguishes such capital from other personal property, and investments, in the various manufacturing and industrial enterprises. And this is the sense in which it is used in our tax laws as appears by reference to the statutes. §§ 3, 4, p. 982, R. S. (7th ed.); chap. 195, Laws of 1845; chap. 456, Laws of 1857; chap. 240, Laws of 1863; § 1, p. 1036, R. S. (7th ed.); chap. 542, Laws of 1880, and the laws amendatory thereof. Such is also believed to be the meaning attached to these words as generally used in the Federal statute. The obvious intent of the Federal statute was to prevent discrimination against investments in national bank shares, and put them upon terms of equality as to taxation with similar institutions and investments in the several States, and the language of the statute seems to have been selected with reference to that object. The rule of comparison stated therein is not with the rate of taxation imposed upon personal property generally, or with specific investments in mining, manufacturing or the various other industrial corporations organized throughout the State, but with other "moneyed capital" in the hands of individual citizens. These are words of limitation as well as of description, and are to be defined according to the meaning which has been generally given to them.

It was said in *Evansville Bk. v. Britton*, 105 U. S. 322, 324 that "the act of Congress does not make the tax on personal property the measure of the tax on bank shares in the State, but the tax on moneyed capital in the hands of the individual citizen." "Undoubtedly there may be much personal property exempt from taxation, without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital." In *Providence Inst. for Savings v. Boston*, 101 Mass. 575, 583; s. c., 3

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Am. Rep. 407, it is said "that this clause was obviously intended to preclude the possibility that property of that description should be singled out for special and peculiar taxation. Its operation would be to prevent oppressive and hostile discriminations unfavorable to the banks." It might well seem reasonable to Congress to take some precaution that the banks in each State should be taxed only at the same rate, and generally in the same manner, as the moneyed capital of individual citizens in the same State. It is claimed in *Hepburn v. School Directors*, 23 Wall. 480, 481, that the words "moneyed capital," as used in the act, signified only money put out at interest, but the court there held that such a construction was too narrow, and that the phrase included stock in banks, and perhaps other stocks and securities. The court in that case further held that the exemption of some moneyed capital from assessment did not necessarily invalidate a statute authorizing an assessment upon national bank shares, saying that "it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt."

We are therefore of the opinion, even if it could be shown that there were some corporations, or some personal property, that was subject to a less rate of taxation than that of capital employed in banking corporations, it would not vitiate the law imposing taxes upon shares in banks, unless it appeared to be the clear intent of the legislature thereby to effect discrimination against them.

It is further claimed "that the proceedings under chapter 230 of the Laws of 1843 would deprive the appellant of his property and liberty, without due process of law." There is no foundation for this claim.

The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative, and not judicial in their character, and to constitute due process of law within the meaning of the Constitution. Such proceedings have from necessity been exercised by governments during all times, by summary methods of procedure, and to require the deliberation and delay incidental to judicial proceedings in the exercise and enforcement of the taxing power by government would seriously cripple its efficiency, if not destroy its existence. These methods were in exercise and existence long before the adoption of the Constitution, and have never been supposed to be affected thereby. In the *Matter of N. Y. P. E. Pub-*

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lic School, 31 N. Y. 574, 584. Judge DENIO says, that "in executing the taxing power, the legislature provided such agencies and safeguards against surprise, mistake or injustice, as it thought expedient. It is manifestly proper that the tax payer should have notice of the imposition proposed to be laid upon them, and an opportunity for making suggestions and explanations to the proper administrative board or officer; and this is generally secured in all well-considered systems of taxation. But it is for the legislature to determine and prescribe, in every case, what shall be sufficient, and there is not, that I am aware of, any constitutional provision bearing on the subject." Judge PORTER, in *Rockwell v. Nearing*, 35 N. Y. 302, 308, says: "There are many examples of summary proceedings, which were recognized as due process of law, at the date of the Constitution, and to these the prohibition has no application." The Supreme Court of the United States in *Murray's Lessee v. Hoboken Land Improvement Co.*, 18 How. 272, stated, "that probably there are few governments which do or can permit their claims for public taxes either on the citizen or the officers employed for their collection or disbursement to become subjects of judicial controversy according to the course of the law of the land. Imperative necessity has formed a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding and sometimes by systems of fines and penalties, but always in some way observed and yielded to." See also *McMillen v. Anderson*, 95 U. S. 37; *Harris v. Wood*, 6 Monr. 642; *Weimer v. Bunbury*, 30 Mich. 201.

As we have seen, the appellant had full notice of the proceedings for the imposition of the tax in question, and an opportunity to question their correctness by proceeding to review the action of the assessing offices, if he had felt aggrieved thereby, but having omitted to exercise that right he is now estopped from raising any question affecting the regularity of the proceedings, or the exercise of the judicial powers conferred upon the assessors in making the assessment in question.

We have thought it unnecessary to discuss other answers to the points raised, and other questions presented upon the briefs of counsel as they are either embraced in what has been already said, or are too plain to require serious notice.

The order should be affirmed.

All concur.

Order affirmed.

DuBois v. CITY OF KINGSTON.

(103 N. Y. 219.)

Municipal corporation — negligence — stepping-stone on sidewalk.

A stepping-stone in front of a public building just inside the curb of the sidewalk is not such an obstruction as will render a city liable for an injury sustained by a person falling over it, even though others had previously been injured by falling over it.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

John J. Luison, for appellant.

John E. Van Etten, for respondent.

MILLER, J. The plaintiff was injured on the evening of November 23, 1872, while running to a fire, which appeared to be in the direction of his own house, in the city of Kingston, by falling over a stepping-stone lying on the sidewalk in one of the streets of said city. The stone was three feet four inches in length, twenty inches wide and fourteen inches high. It lay lengthwise with the curb and on the inside thereof, in front of the building containing the post-office, a music hall and several stores. Across from the stone diagonally on the inner side of the walk was a railing guarding and running along an area way which led to the basement of the building. This area occupied three feet and seven inches of the sidewalk, leaving a passage-way at its most narrow point between the railing and the stone at from four feet and ten inches to six feet. At the north end of the stone, over which the plaintiff stumbled, was a lamp-post, which covered about one-half the width of the stone. At the south end of the stone was a crosswalk.

The stone was placed there some three years previously as an accommodation to the public in alighting from and getting into vehicles, and without the knowledge or consent of the defendant, and no proof was given showing an express notice thereof to the defendant.

There was evidence upon the trial that some five different persons had fallen over the stone and been injured thereby. At the time of the accident in question gas-lights were burning in the

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post-office and the street lamp was lighted. Actions against municipal corporations for injuries sustained by individuals while using or passing along its streets are founded upon the ground of negligence of its officers in performance of their official duties and cannot be maintained without evidence showing that they have been derelict in this respect, by means of which the injury has been sustained. We think there was no such proof upon the trial of this action. The stepping-stone over which the plaintiff fell and was injured was not of unusual size or of an improper construction, nor was it located at an improper place. It was placed in a position on the sidewalk most convenient for persons who should alight from a wagon or carriage or get into the same from the sidewalk, and thus it was a means of accommodation to those who had business at the post-office or in the building in front of which it was located. It was not any more exposed than was essential for its proper and useful location. The passage-way between the store and along the area way of the building was ample for the accommodation of individuals who were going along the sidewalk, and any person who exercised ordinary care and caution could, under the circumstances presented, have passed along by this stepping-stone without coming in contact with it. The gas was lighted in the post-office and in the lamp near by, and hence it was easy to see the stone and to avoid it by a proper use of the faculties. The fact that the plaintiff was running in the direction of his own house, with the apprehension that it might be on fire, should not excuse him for not avoiding a stone of this kind placed on the sidewalk. It was not necessarily in his way. In fact it was on one side of the walk and on the side near the street curb. There was no difficulty in passing along the open space without coming in contact with it. The stepping-stone could have been placed in no position in which it could have been more useful and convenient in front of the post-office, and there is no ground for claiming that it should have been guarded and protected so as to prevent people from running against it. Such caution is not required in placing such a necessary and convenient appendage in front of a building in the public street, and it cannot be said, we think, that it is dangerous necessarily when occupying such position.

The fact that other persons had been injured by falling over the stone does not of itself establish that it was improperly placed in the location it occupied, or that it was necessarily of such a dan-

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gerous character as to require the interposition of the city authorities to remove it. Such an accident might well take place in reference to any necessary structure connected with the sidewalk or a building thereon, which might possibly interfere with persons using the same.

It would be extending the rule of the liability of municipal corporations far greater than has yet been done in any decided case, to hold that they are liable for assenting to the placing of stepping-stones on the edge of sidewalks in front of hotels, stores, public buildings and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by a failure of their officers to keep the streets and sidewalks in a proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping-stones, which are almost a necessity in providing for the interest, comfort and convenience of the public in the maintenance of walks, avenues and streets, constitute a nuisance or obstruction, and that corporations are liable for damages by reason of accidents caused thereby.

As this case is presented there is no evidence which justifies the conclusion that the stepping-stone in question was dangerous to travellers passing along the street, or that the city authorities were chargeable with negligence in allowing it to remain where it was located.

[Omitting question of contributory negligence.]

For the reason stated the court erred upon the trial in denying the motion to nonsuit the plaintiff, as well as the motion to dismiss the complaint.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Frank v. Mutual Life Insurance Company of New York.

FRANK V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(102 N. Y. 206.)

Insurance — on husband's life for wife — assignment by wife — forfeiture.

Where a wife procures a policy of insurance on the life of her husband for her benefit, paying the premium out of her estate, and assigns it and afterward fails to pay premiums after notice to do so, and the assignee surrenders it to the company, *held*, that the policy is forfeited, but that she can recover from the assignee the amount paid him by the company on the surrender, less premiums paid by him.

ACTION to recover surrender value of a policy of insurance. The opinion shows the case. The plaintiff had judgment below.

Julien T. Davies and John H. V. Arnold, for appellant.

A. R. Dyett, for respondent.

RAPALLO, J. We are of opinion that the policy issued by the defendant company to the plaintiff on the life of her husband, on the 21st of January, 1869, was, under the decision of this court in *Brummer v. Cohn*, 86 N. Y. 11; s. c., 40 Am. Rep. 503, and preceding cases therein referred to, not assignable by her, and that she had the right to avoid the assignment made by her to Martin Kupfer on the 16th of September, 1875. That consequently the subsequent assignment made by Kupfer, with her consent, on the 17th of August, 1876, to the defendant Demond, and the surrender by him to the company on the 9th of January, 1877, were not binding upon her.

The learned counsel for the insurance company contended that the policy was not taken out under the act of 1840, and was not within the decisions holding such policies to be non-assignable, for the reasons that the contract of insurance was with the wife and that she paid the first premium, as appears from the recital in the policy, and that the husband paid none of the premiums out of his own funds.

There is no finding that the premiums, subsequent to the first, were paid by the wife, or that they were not paid by the husband, nor was there any request to find such facts. The only finding with respect to who paid the premiums, other than the last two

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paid, is that the policy was issued to the plaintiff in consideration of the sum of \$178.50, duly paid to the company by the plaintiff, and of the quarter annual payment of a like amount on certain days during the continuance of the policy.

The only evidence on that point on the trial, in addition to the recital in the policy, was the testimony of the plaintiff's husband, who stated that he paid the premiums himself for his wife up to April, 1876, but on cross-examination he said he could not recollect whether or not they were paid by his wife's father out of his own money. The premiums due in July and October, 1876, are found to have been paid by the defendant Demond.

The act of 1840, chap. 80, is not confined to cases where the premiums are paid by or out of the funds of the husband. As originally enacted it authorized any married woman to cause to be insured, for her sole use, the life of her husband, and provided that the amount of insurance when due should be payable to her, free from the claims of the representatives of the husband or of any of his creditors, but that such exemption should not apply where the amount of premium annually paid should exceed \$300. But by the act of 1858, chap. 187, this condition of the exemption was confined to cases where the premium, exceeding \$300, was paid "out of the funds or property of the husband," clearly implying that the act contemplated their being paid from some other source; and by the act of 1877, chap. 277, the condition was further modified so as to provide merely that where the amount of premium paid out of the funds or property of the husband should exceed \$500, the excess should inure to the benefit of the creditors of the husband. In *Eadie v. Slimmon*, 26 N. Y. 9, the leading case upon this subject, and in most of the cases which have followed it, the same feature appears to which the counsel refer as taking the present case out of the principle of those cases. The policy in *Eadie v. Slimmon* recited the payment by the wife of the premium for the first year, and that recital does not appear to have been controverted in any manner, and in none of the cases in this court is the question whether the premium was paid by the husband or the wife treated as material.

In *Wilson v. Lawrence*, 8 Hun, 593; s. o., 13 Hun, 228, 241, it was deemed by the Supreme Court material to inquire by whom the premiums were paid. The policy contained the same recital, and so far as appeared when the case first came before the court at

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General Term, 8 Hun, 593, the wife had paid the premiums. On this ground the court held that the policy, being valid at common law, was not issued under the statute, and that her assignment of it to the plaintiff was good, to the extent of securing the repayment to her assignee of the sum paid him on the assignment. On a new trial it was proved and found, notwithstanding the recital in the policy of the payment of the first premium by the wife, that in fact all the premiums had been paid by the husband, and on that ground the policy was held to be non-assignable. *Wilson v. Lawrence*, 13 Hun, 238, 241. The judgment was affirmed in this court, *Wilson v. Lawrence*, 76 N. Y. 585, but the supposed distinction was not considered here.

The argument of counsel is that inasmuch as at common law the wife had an insurable interest in the life of her husband (a point which had not been decided by this court at the time of the decision in *Eadie v. Slimmon*), an insurance thereon for her benefit, where the premiums were paid out of her separate estate by her or her trustee, would be valid, and would be protected against the creditors of the husband, independently of the statute; therefore that in such a case a policy taken out by her, especially where, as in this case, it contained no reference to the statute, was not taken out under the statute, and was assignable by her.

We think the court has gone too far in the other direction to justify it in establishing this distinction now. The rule, that such policies were not assignable, was not derived from any provision of the statute, but was established by the decisions of the court, and has been steadily adhered to. In the case in which it was first promulgated, *Eadie v. Slimmon*, 26 N. Y. 9, the case discloses, as has already been stated, that the contract of the company was with the wife, and the first premium was paid by her, and the decision has been followed in many subsequent cases. In 1873 the doctrine of those cases was recognized by the legislature by conferring upon married women the power to assign their policies, when they had no children, on complying with certain formalities, Laws of 1873, chap. 341, and in 1879 full power to assign was conferred upon them without those conditions, provided the husband consented to the assignment. Laws of 1879, chap. 248. We are not disposed at this late date to introduce the distinction claimed, although it is sustained by forcible arguments.

It is further argued that inasmuch as it has been decided by this

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court in *Smillie v. Quinn*, 90 N. Y. 492, that a policy taken out by a wife on the life of her husband is not liable, even for the debts of the wife, and the amount of premiums which may be paid otherwise than out of the funds of the husband is unlimited, a married woman having property might place such property beyond the reach of her own creditors by investing it in effecting insurance to an extravagant amount on the life of her husband. It seems from the report of the case of *Smillie v. Quinn*, in the Supreme Court, 25 Hun, 334, that it was found as a fact that the premiums were paid with the funds of the husband, and that fact was made one of the grounds upon which that court held the proceeds of the policy not liable for the debts of the wife. In this court, *Smillie v. Quinn*, 90 N. Y. 492, that circumstance is not relied upon, and the decision is placed upon the grounds that the wife alone had the right to avoid the assignment, and reclaim the policy, and that she could not be compelled to do so, and that a receiver appointed in a proceeding instituted by her judgment creditors had no such right. It was also held in that case that her assignment was not fraudulent as against her judgment creditors under the circumstances of that case. But should such a case arise as is supposed in the argument of counsel, it would present questions which are not concluded by the decision in *Smillie v. Quinn*, and which are not presented in the case now before us. It is sufficient to say that the non-assignability of such a policy at the time the assignment now in controversy was made, did not depend upon the question whether the premiums were paid by the husband or by the wife, or by a third person. Since then all such policies have been made assignable by the wife with the consent of the husband. Laws of 1879, chap. 248.

But although we hold that the plaintiff was protected by the principle established in *Eadie v. Slimmon*, and subsequent cases, and that the result was that she had the right to avoid her assignment and reclaim her policy, as is held in *Smillie v. Quinn*, 90 N. Y. 492, it does not follow that she has established in this case any right of action against the defendants, the insurance company. She certainly cannot claim under the policy, for she has failed to perform its condition. This was held by the court below, and as we think, correctly. The condition of the policy was that if the premiums thereon should not be paid when due, the policy should cease and determine. It is found by the trial court that the pre-

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mium falling due on the 21st of January, 1877, was not, nor was any subsequent premium paid to the company, and that on the 21st of January, 1877, the policy and all the right of the plaintiff therein became lapsed and forfeited, and all payments thereon became forfeited to the company. It is also found that the thirty days' notice required by chapter 341 of the Laws of 1876 had been given by the company to the plaintiff. These facts preclude any recovery by her on the policy. As between her and the company she was placed in no better position in this respect by her assignment of the policy and its surrender by her assignee, than she would have been in if she had retained the policy. She had the right to avoid her assignment and reclaim her policy, and if she had tendered the premium to the company it would have been its duty to accept it. Nothing had been done to prevent that course being pursued. The fact is found that when the policy was surrendered to the company by the defendant Demond, the company attached to it his receipt for the sum paid him, and stamped on the back of the policy the words: "Paid January 9, 1877," and has ever since retained possession of the policy so canceled. There was nothing in all this which prevented the plaintiff, had she desired to avoid her assignment, from so notifying the company, and paying or tendering the premiums as they fell due, and in the absence of such tender, it is not to be presumed that the company would have refused to accept them.

On these grounds the court below held that the plaintiff was not entitled to require the company to issue a paid-up policy pursuant to the provisions of the original policy, but found as a conclusion of law that the plaintiff was entitled to recover, both of the company and Demond, the sum of \$2,979.42, with interest, less \$357 for premiums paid by Demond, the balance being the amount paid by the company to Demond on the 9th of January, 1877, when he surrendered the policy.

In the conclusions of law set forth in the decision of the court, the ground of this recovery is not stated. There is no finding of the conversion of the policy by either Demond or the company, nor is there any finding or any allegation in the complaint, or any proof that it was ever demanded of either. The finding is that no demand was made of Demond. But in the opinion of the learned trial judge he states that he holds the facts to be sufficient to render the defendants liable for a conversion of the plaintiff's property.

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The complaint, after setting forth the policy and the assignment from the plaintiff to Kupfer as collateral security for a loan from him to the plaintiff's husband, and the assignment from Kupfer to the defendant Demond, alleges that Demond, in some manner unknown to the plaintiff, delivered up the policy to the company, who thereupon paid him therefor the sum of \$2,970.42, and cancelled the policy, and has ever since retained possession of the same as cancelled. That the policy was not assignable by the plaintiff, who had no power to assign the same, and in law she was still entitled to the same and all benefit and advantage thereof as if she had never assigned the same to any one, and she demanded as relief judgment against the defendants for the sum of \$5,333, or whatever sum might be the surrender value of the policy, with interest from January 9, 1877, or that the company be adjudged to issue to her a paid-up policy as provided in the original policy.

Under this complaint, which sets forth a cause of action *ex contractu*, it is difficult to see how a recovery can be had for a cause of action *ex delicto*, or how in the face of the claim that the plaintiff is still entitled to the same benefit and advantage from the policy as if she had never assigned it, she can recover on the ground that either of the defendants has converted it.

But so far as the defendant, the insurance company, is concerned, there are further insuperable difficulties in the way of sustaining an action for conversion. In the first place, the possession of the policy by the defendant Demond was lawful until the plaintiff elected to avoid her assignment and reclaim her policy, and until she did so reclaim it, neither of the parties was guilty of a wrong in holding it, and further, what was done by the company did not amount to a conversion.

The mere receipt of the policy from Demond, who stood in the place of her assignee, and the payment to him of the surrender value and marking the policy cancelled, before any election on her part to avoid the assignment, and retaining the policy in their possession, was no violation of her rights and did not impair them, as she herself avers in her complaint, in which she states that the policy is still in the possession of the company, and that she is entitled to the same benefit and advantage thereof as if she had never assigned it. The loss of her claim against the company is due, not to the surrender of the policy, or its cancellation, but to her failure to keep it alive by the payment of premiums, and this failure was

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in no manner attributable to the acts either of Demand or of the company.

It is in this respect that the present case differs decisively from *Whitehead v. N. Y. Mutual Ins. Co.*, 102 N. Y. 143.* In that case we held that the non-payment of the premiums after the surrender of the policy was occasioned in part by the wrongful act of the company in accepting a surrender from one having no authority to represent the assured, and that the insurance company participated with the husband in keeping the wife and children in ignorance of their rights. In the present case accepting the surrender was not, as we have said, a wrong to the plaintiff, nor was she in any manner kept in ignorance of her rights, or prevented by any act of the company from continuing her payments, nor had the company, in the case last cited, given to the assured the notice required by the act of 1876, chap. 341, and which was essential to entitle it to terminate the policy.

In the recent case of *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498, we held that where an insurance company had issued a policy to M. & K. upon a steamboat, loss payable to the H. & H. Company who were mortgagees, and afterward at the request of a third person, presumed to represent the mortgagees, the company altered the policy by drawing a line through the names of M. & K., and interlining in their place the name of J. G. as the assured, and interlining after the names of the mortgagees, the words "to the extent of their interest and balance, if any, to I. G.," leaving however the original language of the policy legible, and returned the policy thus altered to the person who had requested the alteration, the rights of the parties were not impaired, and they could not maintain an action against the company as for a conversion of the policy. This decision shows that the mere stamping of the policy "paid" in the present case, leaving it in other respects in its original condition, did not impair the rights of the plaintiff, and that she sustained no damage therefrom.

For these reasons, and there being no theory other than that of conversion upon which the company can be held liable, the judgment against the Mutual Life Insurance Company should be reversed.

The cause of action against the defendant Demand stands upon a different footing. We do not think that under the pleadings a

* *Ante*, p. 787.

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recovery in tort for a conversion can be sustained against him, but they are properly framed to sustain an action for money had and received, and the judgment against him conforms to that theory, being for the precise sum received by him from the company less the premiums paid by him with interest. He was in possession of the policy under a title which, as we have already shown, was invalid and avoidable at her option. While so in possession and while the policy was still in force, he surrendered it and received therefor the sum for which judgment has been rendered against him. Whether or not these acts constituted as to him a conversion of the policy is immaterial, for even if they did, she could waive the tort and adopt his acts as having been performed for her benefit. Her right to avoid the assignment could be exercised as well after as before his receipt of the avails of the policy, and the bringing of this action against him was sufficient election to avoid the assignment and adopt his act in receiving the avails. It is true that he paid for the assignment from Kupfer in August, 1876, the amount which Kupfer had advanced in 1875, and which as is found went to the use of the plaintiff's husband, and that the plaintiff slept on her rights until 1881, when this action was brought, and she elected to repudiate her acts on the faith of which the defendant advanced his money. But the period not being sufficient to bar her claim by the statute of limitations, we see no ground upon which we can deny to her the protection against her own acts which is afforded her by *Eadie v. Slimmon* and like cases.

The exceptions taken by the defendant Demond to the exclusion of evidence that in August, 1876, when he paid the premium due July 21, 1876, the secretary of the insurance company informed him that the policy had lapsed, but that if he, Demond, would pay the premiums already due, the company would revive the policy for his benefit alone, was not in our judgment well taken. No new policy was issued to Demond, and the existing policy could not be revived and at the same time converted into an insurance in favor of Demond alone. If it was forfeited and the acceptance of the premium from Demond was a waiver of the forfeiture and revival of the policy, the assured was entitled to the benefit of such waiver and revival. But there was no proof that it had been forfeited at that time, as it does not appear that the thirty days' notice required by chapter 341 of the Laws of 1876, had then been given. If the policy had been forfeited, a waiver of the forfeiture would

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necessarily inure to the benefit of whoever was entitled to the policy.

The judgment should be affirmed, with costs as to the defendant Demond, and reversed as to the defendant the Mutual Life Insurance Company of New York, and new trial granted, with costs to abide the event.

All concur.

Judgment accordingly.

HAYNES V. RUDD.

(103 N. Y. 372.)

Duress — in procuring a contract to compound felony.

One cannot maintain an action to recover money paid by him upon a note given wholly or partly to compound a felony, although it was procured from him by duress and undue influence.

ACTION to recover money paid upon a note. The opinion states the case. The plaintiff had judgment below.

T. W. Collins, for appellant.

W. R. Mason, for respondent.

MILLER, J. The plaintiff seeks to recover in this action the amount of a promissory note given by him upon the settlement of a claim by defendant, that plaintiff's son, who was in defendant's employ, had at different times stolen his money.

The complaint alleged that the note was given in order to compound and settle a supposed felony or misdemeanor, and that the said note was extorted from the plaintiff and his wife by threats of public charges against the character of their son, and that the note was executed in fear of the same. It was transferred by plaintiff before maturity to a *bona fide* holder, and plaintiff paid it.

On a former appeal to this court in this action, it was held that where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid.

In the opinion of the court by FOLGER, C. J., the rule is laid down that if there was simply a compounding of felony, both plaintiff and defendant, on an equality, agreeing that the plaintiff should give his written promise to the defendant, and that therefore the defendant should give his oral promise to conceal the felony and abstain from prosecuting it, and withhold the evidence of it, then they were *in pari delicto*, and the law will leave them where it finds them, and it is said that "to give the plaintiff any claim to recover, he must show that he was in such plight from the force or threats of the defendant as that he was in duress, and gave the note without being willing to, to escape from the predicament in which that force or those threats put him."

Upon the last trial, which is the subject of review on this appeal, the case appears to have been presented by the plaintiff on the theory that threats were used, and duress and undue influence exercised by the defendant upon the plaintiff and his wife, by means of which the note was obtained, independent of the question whether the note was executed for the purpose of compounding a felony, and that thus a case was established against the defendant.

The plaintiff in this action insists that the facts establish that the parties did not stand *in pari delicto*; that the defendant took undue advantage of the plaintiff and his wife, of the circumstances in which the plaintiff stood, surrounded as he was by his family; that this operated as duress and undue influence to coerce, and as the jury found, did coerce the plaintiff's will and destroy the equality between the parties and induced the plaintiff to give the note in question.

In none of the cases cited by the respondent's counsel to sustain the position contended for was the precise point presented whether the parties stood *in pari delicto* when the compounding of a felony entered into and constituted part of the consideration of the contract, and they therefore are not decisive of the question. *Dunham v. Griswold*, 100 N. Y. 244; *Turley v. Edwards*, 1 West. Rep'r, 450; *Foley v. Green*, 14 R. I. 618; s. c., 51 Am. Rep. 419; *Williams v. Bayley*, L. R., 1 H. L. 200; s. c., 25 L. J. Ch. 717.

Whether the parties stood *in pari delicto* depends upon the fact whether the evidence proved that the note in question was given for compounding a felony. If the testimony established that such was the case, then both parties must be regarded as equally in fault, and the court will not lend its aid to either in enforcing a contract

of such a character, because it is illegal and void. While fraud, duress and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist and cannot be enforced where the consideration of the contract, thus made, arises entirely upon or is in any way affected by the compounding of a felony. When this element enters into a contract, it becomes tainted with a corrupt consideration and cannot be enforced. The correctness of this rule was recognized by the trial judge in his charge to the jury. He charged, among other things, as follows: "Was the note a legal contract or an illegal contract? It was an illegal contract and void between the parties if it was given upon an agreement to suppress the evidence of a crime alleged to have been committed equally as if it were given upon an agreement to suppress the evidence or refrain from prosecuting a crime which had been in fact committed." He also charged, "If he impressed upon the plaintiff the idea that he would thus refrain and would conceal the crime if he would give the note, but that he would not refrain if he did not give the note, it was an illegal contract." He further charged upon being requested that if the note was given simply to compound a felony, the plaintiff could not recover. So far the charge of the judge was entirely correct, and the case was properly presented to the jury in this respect.

The judge however was requested to charge as follows: "That if the compounding of a felony entered into and formed a part of the consideration of the note, the plaintiff could not recover." And also, "that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he would not be entitled to recover."

Both of these requests were refused and exception taken to the rulings of the judge. We think there was error in each of the refusals. Within the rule already laid down, if the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal, and should not be upheld. In such a case the contract was vicious and corrupt, and in violation of law as much as if compounding a felony had been the entire consideration. The element of illegality constituted a part of

In the opinion of the court by FOLGER, C. J., the rule is laid down that if there was simply a compounding of felony, both plaintiff and defendant, on an equality, agreeing that the plaintiff should give his written promise to the defendant, and that therefore the defendant should give his oral promise to conceal the felony and abstain from prosecuting it, and withhold the evidence of it, then they were *in pari delicto*, and the law will leave them where it finds them, and it is said that "to give the plaintiff any claim to recover, he must show that he was in such plight from the force or threats of the defendant as that he was in duress, and gave the note without being willing to, to escape from the predicament in which that force or those threats put him."

Upon the last trial, which is the subject of review on this appeal, the case appears to have been presented by the plaintiff on the theory that threats were used, and duress and undue influence exercised by the defendant upon the plaintiff and his wife, by means of which the note was obtained, independent of the question whether the note was executed for the purpose of compounding a felony, and that thus a case was established against the defendant.

The plaintiff in this action insists that the facts establish that the parties did not stand *in pari delicto*; that the defendant took undue advantage of the plaintiff and his wife, of the circumstances in which the plaintiff stood, surrounded as he was by his family; that this operated as duress and undue influence to coerce, and as the jury found, did coerce the plaintiff's will and destroy the equality between the parties and induced the plaintiff to give the note in question.

In none of the cases cited by the respondent's counsel to sustain the position contended for was the precise point presented whether the parties stood *in pari delicto* when the compounding of a felony entered into and constituted part of the consideration of the contract, and they therefore are not decisive of the question. *Dunham v. Griswold*, 100 N. Y. 244; *Turley v. Edwards*, 1 West. Rep'r, 450; *Foley v. Green*, 14 R. I. 618; s. c., 51 Am. Rep. 419; *Williams v. Bayley*, L. R., 1 H. L. 200; s. c., 25 L. J. Ch. 717.

Whether the parties stood *in pari delicto* depends upon the fact whether the evidence proved that the note in question was given for compounding a felony. If the testimony established that such was the case, then both parties must be regarded as equally in fault, and the court will not lend its aid to either in enforcing a contract

of such a character, because it is illegal and void. While fraud, duress and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist and cannot be enforced where the consideration of the contract, thus made, arises entirely upon or is in any way affected by the compounding of a felony. When this element enters into a contract, it becomes tainted with a corrupt consideration and cannot be enforced. The correctness of this rule was recognized by the trial judge in his charge to the jury. He charged, among other things, as follows: "Was the note a legal contract or an illegal contract? It was an illegal contract and void between the parties if it was given upon an agreement to suppress the evidence of a crime alleged to have been committed equally as if it were given upon an agreement to suppress the evidence or refrain from prosecuting a crime which had been in fact committed." He also charged, "If he impressed upon the plaintiff the idea that he would thus refrain and would conceal the crime if he would give the note, but that he would not refrain if he did not give the note, it was an illegal contract." He further charged upon being requested that if the note was given simply to compound a felony, the plaintiff could not recover. So far the charge of the judge was entirely correct, and the case was properly presented to the jury in this respect.

The judge however was requested to charge as follows: "That if the compounding of a felony entered into and formed a part of the consideration of the note, the plaintiff could not recover." And also, "that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he would not be entitled to recover."

Both of these requests were refused and exception taken to the rulings of the judge. We think there was error in each of the refusals. Within the rule already laid down, if the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal, and should not be upheld. In such a case the contract was vicious and corrupt, and in violation of law as much as if compounding a felony had been the entire consideration. The element of illegality constituted a part of

the contract, thus vitiating the whole, and it could not be rejected because duress, undue influence or threats were also blended with it.

It cannot be said that these requests were covered by the charge which had already been made, for while such charge comprehended the principle that the note might be avoided if given for compounding a felony, the refusals to charge left it to be inferred that this element might constitute a portion of the consideration without affecting its validity. This was clearly wrong, and the defendant was entitled to the charge in accordance with the requests made, and the judge erred in refusing the same.

We cannot agree with the doctrine that if the plaintiff was influenced by the duress of the defendant, and at the same time both parties intended the compounding of a felony, that they were not *in pari delicto*. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect.

For the errors of the judge in refusing to charge as requested, without considering the other questions raised, the judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, except RUGER, C. J., not voting.

ENGEL V. FISCHER.

(108 N. Y. 400.)

Statute of limitations — defendant in hiding but within jurisdiction.

Defendant accepted a bill in Austria in May, 1873, due in three months. In July of that year he absconded and came to New York, where he has since lived under a fictitious name but not otherwise concealed. Plaintiff discovered him in April, 1889, and brought this action. *Held*, barred by the statute of limitations.

ACTION on a bill of exchange. The opinion states the case. The defendant had judgment at trial, which was reversed at General Term.

C. E. Bushmore, for appellant.

Benno Lewinson, for respondent.

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EARL, J. This action was commenced against the defendant as acceptor of a bill of exchange payable three months after date, drawn on the 1st day of May, 1873, at Vienna, Austria, for three thousand six hundred gulden, equivalent in our money to \$1,512. The defense interposed is that the cause of action was barred by the statute of limitations.

The facts are these: The defendant resided in Austria, where he accepted the bill, and soon thereafter he absconded, and in July came to the city of New York, and there he has ever since resided. On reaching New York, for the purpose of concealing himself from his creditors, he assumed the name of Marcus L. Fischer, and thereafter bore that name and hid himself thereunder. The plaintiff discovered him in the city of New York in April, 1882, and there, at his store, demanded of him the payment of the draft, which was refused, and then, in the same month, this action was commenced.

While the plaintiff concedes that more than six years had elapsed from the time the cause of action accrued against the defendant, he claims the benefit of the exception contained in section 401 of the Code, which is as follows: "If, when the cause of action accrues against a person, he is without the State, the action may be commenced within the time limited therefor after his return into the State. If after a cause of action has accrued against a person he departs from and resides without the State, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action."

This section does not aid the plaintiff, because the defendant was not without the State when the cause of action accrued, and he never thereafter departed from the State.

While the defendant bore an assumed name, he was, physically, at all times, within this State, and there was no hiding or concealment of his person except as he assumed and bore the fictitious name. It passes my comprehension how, by any process of reasoning or metaphysics, such a person continually present in the State for nearly ten years can be said never to have come here and to have been continually absent from the State.

It is quite probable that the defendant perpetrated a fraud upon the plaintiff by concealing his residence from him, and that the statute is resorted to by him to defeat a just claim. Yet the statute must have its operation. Its plain language cannot be per-

verted to remedy the hardship of any particular case. It is a benign statute, and the legislature has written in it all the exceptions which sound policy dictated to it. It may frequently operate to defeat just claims and be used by dishonest debtors to escape the payment of honest debts. A cause of action may be barred before it is known to the claimant. The debtor may purposely conceal it, and yet the bar of the statute must inexorably be applied. A debtor who has always resided within the State may abscond from his home and conceal himself within the State from his creditors, and yet no one will claim that such a debtor is to be regarded as without the State, or that such concealment will defeat the running of the statute. The law gives a creditor six years continued presence of his debtor within the State after the cause of action has accrued, and that period has been deemed ample to enable the creditor to find his debtor and to put the machinery of the law in force against him. It would lead to great inconvenience and leave the bench and bar without any certain rule, if in every case where a debtor has resided and continuously been within this State for six years after a cause of action against him accrued, and the statute of limitations is interposed as a bar to an action to enforce the same, it could be a matter of inquiry and litigation, upon disputed evidence, whether the debtor, during any portion of the time, concealed himself, fraudulently or otherwise, and whether the creditor used due diligence to find him.

There are some cases in which what is now the first clause of the section above quoted was under consideration, and it became necessary for the courts to determine what was a return or coming into the State so as to set the statute running, wherein it was decided that the return must be open and notorious and under such circumstances that the creditor could, with reasonable diligence, find his debtor and serve him with process. *Little v. Blunt*, 16 Pick. 359; *Hill v. Bellows*, 15 Vt. 727; *Hysinger v. Baltzell*, 3 Gill & J. 158; *Didier v. Davison*, 2 Barb. Ch. 477; *Ford v. Babcock*, 2 Sandf. 518; *Cole v. Jessup*, 10 N. Y. 96; *Dorr v. Swartwout*, 1 Blatchf. 179; 3 Pars. Cont. (6th ed.) 96, Angell Lim. (2d ed.) 216. A debtor might return to the State clandestinely, for a few hours, in the night-time, or on Sunday, or he might be in the State on his progress through it; and a return of such a character, which might be concealed from and unknown to the creditor and which would afford him no opportunity, by the use of reasonable diligence, to

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serve his debtor with process, is held not to be a return to the State within the meaning of the statute. But it has never before this case, so far as I can discover, been decided that where the debtor was continually in the State for more than six years after the cause of action accrued, he was deemed to have been without the State, and thus the running of the statute defeated because he concealed his abode and thus the creditor was unable to discover him and serve him with process.

The case of *Sleght v. Kane*, 1 Johns. Cas. 76, is not an authority for the plaintiff. There the defendant was held to be without the State while he was in a place which had been conquered and was held by the British troops, and which was neither *de facto*, nor, I am inclined to believe, *de jure* a part of the State, nor subject to the jurisdiction of the State courts.

In *Poillon v. Lawrence*, 78 N. Y. 307, it was held that a discharge in bankruptcy was void to a creditor from whom notice of the bankruptcy proceedings was purposely and fraudulently withheld by conducting the same in a name assumed by the debtor which was entirely different from that under which the debt was contracted; and that case has no bearing upon this.

We are therefore constrained to hold that the order of the General Term should be reversed and the judgment of the Trial Term affirmed, with costs.

Order reversed, and judgment affirmed.

All concur.

BARBER V. ABENDROTH.

(102 N. Y. 406.)

Wharf—liability of owner for injury to vessel by obstruction.

The owner of a wharf is liable for an injury to a vessel lawfully using it, by an obstruction in the river bottom adjoining it, known to him but not to the master of the vessel.

ACTION for injury to a canal boat. The opinion states the case. The plaintiff had judgment below.

D. B. Ogden, for appellant.

J. A. Hyland, for respondent.

RAPALLO, J. : The plaintiff was lawfully using the defendant's dock at the time of the injury complained of. The defendant is a corporation and owned the dock, which was opposite its foundry and was about three hundred feet long. It had contracted for a cargo of sand to be shipped to it, and to be delivered at the dock in question. The sand was shipped on the canal boat "George A. Bennett," owned by the plaintiff and consigned to the defendant, deliverable along side of its dock at Port Chester, N. Y. The boat with its cargo arrived at the mouth of the Byram river on the 25th of August, 1881, at between eight and nine o'clock, P. M., and was then attached to a tug. The tide being then low, the tug anchored and waited till the tide rose enough to take the boat to Port Chester. She arrived there at about twelve o'clock that night. There was a watchman on the dock, and the plaintiff asked him where he should moor his boat, and he said he did not know. The plaintiff then asked him where the last load had been landed, and he pointed out a place, and the plaintiff then moored at the place designated, throwing his lines to the watchman, who took them and made them fast. When the tide fell the boat rested on the bottom which was bare at both ends of the boat, but there was a depression in the center which caused the boat to settle about a foot in the center and thus injured her. The bottom was hard sand.

At the close of the testimony the judge, at the request of the defendant, charged the jury that the plaintiff could not recover unless the jury believed that the defendant had notice that the bottom of the river at the point in question was unsafe, and was guilty of negligence in not warning the plaintiff, and the plaintiff was not guilty on his part of any negligence which contributed to the accident.

This charge was in accordance with adjudged cases, and the converse of the rule laid down is sustained in the same manner. The jury having found for the plaintiff, the verdict must be assumed to have been based upon the facts supposed in the charge.

In *Sawyer v. Oakman*, 1 Low. 134, the rule was laid down by the District Court of the United States that the owners of a dock are responsible for damages suffered by a vessel lawfully using the dock, caused by a defect in the bottom, known to the owners of the dock and not known to the master of the vessel. This decision was affirmed in the Circuit Court of the United States by *WOODRUFF, J.*, in 7 Blatchf. 290.

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The same rule was applied in *Carlton v. Franconia Iron and Steel Co.*, 99 Mass. 216, where the owner of a private wharf procured a vessel to bring a cargo to it, to be there discharged, and suffered her to be placed, at high water, at a place apparently safe but in fact unsafe, there being a sunken rock at the adjoining wharf, of which the defendant had knowledge. The plaintiff might have moored safely at the defendant's wharf, but did not know of the rock. As an illustration, the court, in the case cited, instanced an unsafe entrance to a man's house whereby a carrier coming there at night should sustain damage. See also *Lary v. Woodruff*, 4 Hun, 99; affirmed, 76 N. Y. 617.

In the present case the defendant had authorized the cargo of sand to be sent to it, to be delivered at the wharf in question, and knew that it was coming, although it did not know at what precise time. It was bound to know however that it could only be delivered at high tide, which would, on the day in question, be either about noon or about midnight, the bottom being bare at low tide. The jury must be deemed to have found that the defendant knew the dangerous condition of the bottom, and was negligent in not making provision to warn a vessel coming in by the night tide especially as it had a watchman there who might easily have been instructed. Both of these questions were submitted to the jury at the defendant's request, and found adversely to them. We do not think that the directions given by the watchman made the defendant liable, first, because it was not part of his duty to give them, he being there only to watch the buildings and guard against fire, and secondly, because he did not assume to have authority to give directions, as he said he did not know where the plaintiff should moor. But the inquiry made by the plaintiff showed that he took such precautions as the circumstances afforded, and that in making fast at the place where he was told the last cargo had been landed, he exercised prudence which tended to absolve him from the charge of negligence. There was evidence tending to show that the place selected by the plaintiff was not the proper place, but we think, that taking the whole evidence together, it was sufficient to sustain the verdict.

The judgment should be affirmed.

All concur.

Judgment affirmed.

HICKEY V. MORRELL.

(103 N. Y. 434.)

Warehouseman — liability for false representation of safety of building.

The defendant, proprietor of a warehouse for storage, represented it in circulars to be fire-proof on the exterior. A statute required such buildings to have fire-proof metal window shutters. There were no shutters, and the window frames were of wood. By that representation the plaintiff was induced to store goods in the warehouse. The warehouse caught fire from another building on the window frames, and with its contents was consumed. *Held*, that a nonsuit on the ground that the representation was a mere opinion was error.

ACTION of damages by false representations. The opinion states the case. The defendant had judgment below.

Matthew Hale, for appellant.

John M. Bowers, for respondent.

DANFORTH, J. As to the character of this action the parties are agreed. It is for "falsely and fraudulently" and "with intent to deceive and defraud the plaintiff," representing, among other things, that defendant's warehouse was "fire-proof on the exterior," whereby the plaintiff was induced to deliver to him to be stored therein certain property of value, which while there was destroyed by fire communicated from the outside "to the wooden cornice and wooden frames" of the warehouse and thence to the property in question.

The answer admitted that defendant was proprietor of the warehouse; that it and the article described in the complaint were destroyed by fire; but denied the other matters above referred to as making out a cause of action, and set up that "the property was received and stored by him as a warehouseman, and in no other capacity, and under the special contract that the goods were stored at the owner's risk of fire." There was no controversy as to the evidence. The question was determined upon that introduced by the plaintiff and in view of the law as it stood at the time of the bailment. The appellant refers to the statute (Laws of 1871, chap. 742, § 8), "in relation to storage and other purposes;" imposing

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liabilities upon persons for any fire resulting from their willful and culpable negligence, and which among other things requires "the closing of iron shutters" at the completion of the business of each day, by the occupant of the building having use or control of the same. But the complaint contains no allegation of negligence, and so the action could not stand on that ground either at common law or by statute. Another statute also referred to, relating to buildings in the city of New York (Laws of 1874, chap. 547, § 5), is of some importance in its bearing upon the point chiefly pressed upon us, and as likely to have been in contemplation of both parties. It is there provided that buildings of a certain description—within which the storehouse in question comes—shall have doors and blinds and shutters made of fire-proof metal on every window and opening above the first story." The plaintiff's testimony went to show that she was induced to store her goods with the defendant by representations contained in a circular issued by him, the object of which as therein stated, was to call "the special attention of persons having valuable articles, merchandise or other property or storage, to his new first-class storage warehouse, in the erection of which," it is said, among other things, "no expense has been spared in supplying light, ventilation and protection against the spread of fire, the exterior being fire-proof, and the interior being divided off by heavy brick walls, iron doors and railings appropriate and convenient in every way for the various kinds of articles to be stored." The learned counsel for the respondent argues that the only statements of fact in the paragraph quoted are those which relate to the interior as divided by heavy brick walls, iron doors and railings; that as to those, the defendant had knowledge, and concedes that their non-existence would make him guilty of a misrepresentation. This is a very narrow view of the subject, and could prevail, if at all, only by conceding that the defendant purposely avoided mention of those things which if stated would make his solicitations less attractive, and display him as the owner of a building combustible on the outside, and so of little security to its contents, if they happened to be of the same character.

We think the appellant's ground of complaint a just one. It was proven that in fact the window frames in the warehouse were of wood; that at the outside of the windows there were no shutters; that the cornices were of wood covered with tin. The fire occurred

in the evening. It originated in other buildings across the street; and from them communicated to the wooden window frames on the defendant's building. An architect and a builder, examined as experts, testified that a building constructed as was the one in question, "with wooden window frames and sashes, and no outside shutters," could not be deemed fire-proof, and that in October, 1881, it was practicable to erect a storage warehouse which would be fire-proof on the exterior. At the close of the plaintiff's evidence she was nonsuited upon the ground that the statement in the circular as to the character of the exterior of the building was a mere expression of an opinion, and not the statement of a fact. Upon the same ground the judgment was affirmed at the General Term. In such a circular, obviously intended as an advertisement, high coloring and exaggeration as to the advantages offered must be expected and allowed for, but when the author descends to matters of description and affirmation, no misstatement of any material fact can be permitted, except at the risk of making compensation to whomever, in reliance upon it, suffers injury. Here the allegation is that the exterior of the building is fire-proof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible. That statement, as regards certain well-known substances usually employed in the construction of buildings, while it might in some final sense be deemed the expression of an opinion, could in practical affairs be properly regarded only as a representation of a fact. To say of a building that it is fire-proof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. To say of a certain portion of a building it is fire-proof suggests a comparison between that portion and other parts of the building, not so characterized, and warrants the conclusion that it is of a different material. In regard to such a matter of common knowledge, the statement is more than the expression of opinion; no one would have any reason to suspect that any two persons could differ in regard to it. But when we look at the words accompanying this statement, viz.: "No expense has been spared in supplying protection against the spread of fire," all possibility of doubt seems removed. This danger is pointed out as the one thing which, more than another, the owner had in view, and

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guarded against, and the rest of the sentence shows with what result, viz., "the exterior being fire-proof," and the interior divided off by heavy brick walls, iron doors and railings. Thus the expenditure of money is said to have been limited only by the accomplishment of the desired object, and the statement of the material used is in connection with the representation as to the quality of the exterior. No one reading of inside walls and railings of incombustible material, and of an exterior fire-proof, could suppose that a precaution against fire, made necessary by statute, had been omitted, or that a builder who called attention to such matters as an inducement to patronage, could have regarded wooden window frames as in any sense fire-proof. The language of the circular is very emphatic. In effect it says the buildings, as a whole, have been erected at an immense cost, from which assertion alone, in view of the business to which they were devoted, one would expect strength and adaptation of materials and skill in construction, affording security at least against all the ordinary dangers to which property might be exposed when put in store; but this general statement is followed by the declaration that no expense has been spared in supplying "protection against the spread of fire," and this assurance is made prominent by the display of capital letters, and justified by the explanation which relates to an existing state of things, viz., "the exterior being fire-proof," and still further emphasized by the more moderate and qualified statement as to the interior; that is not said to be fire-proof, but only "divided off by heavy brick walls and iron doors and railings," describing at the same time its arrangement and the substance of its walls and partitions. As to this therefore the statement would be true, although the floors, lintels, stairs, landings, ties, joists, ceilings and other parts were of wood, but no such discrimination is suggested as to the exterior. The strength of the walls might indeed be impaired by the necessary openings for doors and windows, but for the purpose of preventing mischief by fire, or as the defendant put it, "the spread of fire," the exterior is pronounced fire-proof. Had he only said of the exterior as he did of the interior, the wall is of brick, the intending customer would have been put to an inquiry as to the window frames and doors. He said much more. We think therefore that the defendant must be regarded as stating a fact and not as expressing a mere opinion, when he described the exterior; that is the whole exterior, of his buildings as fire-proof. Such

statement is not to be classed with those relating to value, or prospective profits, or prospects of business, or assertions in regard to a speculative matter, concerning any of which men may differ. It relates to something accomplished, to an existing fact as distinguished from one yet to come into existence, it was made after calling to mind the use to which the buildings were to be put, the fact that the attention of the builder had been especially directed to "protection against the spread of fire," which could be effected only by the use of proper materials, and the statement was made with knowledge that such materials had not been used.

Nor is it like the safe case cited by the respondent. *Walker v. Milner*, 4 Fost. & F. 745. There the action was upon a warranty that "the safe in question was thief proof," "that nothing can break into it." *It was broken into. There was no suggestion of fraud or deceit, and the jury were required to discriminate between what was represented and what was warranted, and unless satisfied there was a warranty to find for the defendant. The safe-maker's prospectus was put in evidence; it stated that the safes would insure the safety of valuable property contained in them. The court said: "The words cited from the circular could hardly be understood in the sense of a warranty or assurance of perfect safety, but only as importing a representation of a high degree of strength." They were promissory merely. Then plaintiff's counsel referred to a later prospectus in which the safes in question were only spoken of "as of the strongest security," and relied on this as implying a withdrawal of the previous warranty.

But COCKBURN, J., observed that, "Assuming later prospectuses to have been issued after the burglary, it was only dictated by common honesty. For after it had been found by actual experience that the safe was not absolutely secure against all possible attempts, it would have been fraudulent to continue previous description."

In the case at bar the plaintiff alleges fraud. A jury might find that an exterior of a city building, partly of wood, although to no greater extent than the one in question, was not fire-proof within the meaning and intent of the circular; they might also find that when the circular was issued this fact was known to the defendant, and then the doctrine suggested by COCKBURN, J., in the case cited, would have some application. Nor do the other cases referred to seem to support respondent's contention. They exclude the idea

* See *Herring v. Skaggs*, 62 Ala. 180; a. c., 34 Am. Rep. 4.—REP.

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of fraud, and relate to matters of mere opinion. As whether a certain valve will consume smoke and save fuel? *Prideaux v. Bunnell*, 1 C. B. (N. S.) 613. Whether certain pictures were the work of the old masters, or copies? *Jendwine v. Slade*, 2 Esp. 572. Whether land was of the value certified to? *Gordon v. Butler*, 105 U. S. 553. But in none of them is it denied, that if the person making the statement or expressing the opinion had at the time knowledge of its falsity, the action would lie.

It is certainly well settled upon principles of natural justice that for every fraud or deceit which results in consequential damage to a party, he may have an action. Here the complaint states not only a false representation with a fraudulent intent, but that the falsehood was conscious and willful; that by it the plaintiff was induced to deliver her property to be stored in the building and thereby incurred loss. The evidence may be so viewed as to sustain these allegations.

The learned counsel for the respondent has stated in the broadest and most unqualified terms, as a proposition not to be disputed, "that no man is liable for the expression of his opinion or judgment." But this is true only when the opinion stands by itself and is intended to be taken as distinct from any thing else, and where the proposition is found in the books it is so restricted. Thus it is said: "Matters of opinion, stated merely as such, will not in general form the ground to a legal charge of fraud" (Leake on Contracts, 355), giving many instances and also exceptions to the rule. Statements of value have been held insufficient to sustain an action where, as is said, they were "mere matters of opinion" (*Simar v. Canady*, 53 N. Y. 298, 306; s. c., 13 Am. Rep. 523). but at the same time it is shown that under certain circumstances they are to be regarded as affirmations of fact, and then if false an action can be maintained upon them. The same rule applies where A. desiring credit of B. for a certain amount, the latter asks C. as to the solvency of A. and he replies, "he is good, as good as any man in the country for that sum." No doubt this involves opinion, but it is held that if the recommendation was made in bad faith and with knowledge that A. was insolvent, C. would be liable (*Upton v. Vail*, 6 Johns. 181; s. c., 5 Am. Dec. 210); and so as to every representation concerning a matter of fact by which one man is induced to change his position to his injury or the benefit of another. It may be so expressed as to bind the per-

son making it to its truth whether it take the form of an opinion or not, or it may appear that it was not intended to be acted upon. In the latter case no obligation is incurred.

In the circular issued by the defendant there are many words of commendation, which however strong, could not be relied upon as the basis of contract. The ones at first referred to are not of that character. They relate to the present and describe a portion of the building in its existing state as "being fire-proof." This is not a matter of opinion, for it defines a state or condition, and if part of that portion was of wood, may properly be regarded as a "false statement of a fact." Whether the defendant knew the component parts of his own buildings, and if so, whether the statement was made with intent to deceive, and whether it was an inducement to the contract, the learned counsel for the respondent has fully argued. At present it is unnecessary to discuss those questions, for it seems to us they are, as the case stands, properly for the jury, and upon the only point which appears to have been considered by the court below we are obliged to differ from them.

That the issues may be more fully tried, the judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.

All concur, except ANDREWS and MILLER, JJ., not voting, and EARL, J., dissenting.

PEOPLE V. CRUGER.

(100 N. Y. 510.)

Criminal law—larceny—appropriation of proceeds of pledge.

Where one intrusts personal property to another to procure a loan on it, and the latter procures the loan but appropriates the proceeds, this is not larceny of the property pledged.

CONVICTION of grand larceny. The opinion states the case.

Morris A. Tyng, for appellant.

Randolph B. Martine, for respondent.

People v. Crager.

DANFORTH, J. The conviction is for stealing, on the 10th of March, 1885, a diamond pin, the property of one Porteous. It appeared in evidence that the defendant was engaged in the business of buying and selling jewelry, and of effecting loans upon personal property; that before the time in question there had been dealings between the parties in relation to the pin, but on that day it was in the possession and under the sole control of Porteous, who, as he testified, left it with the defendant to be sold, but according to the testimony of the defendant, Porteous wanted him to procure a loan upon it, and did not direct a sale. It also appeared that at the police court, on the 26th of April, 1885, at an examination concerning the same transaction, Porteous was asked this question: "You authorized a loan?" and answered "Yes, sir, when he" (the defendant) "suggested either a loan or a sale." Other circumstances in evidence sustain the defendant's version, and there are some which might impair the credit of the complainant as a witness. There was sufficient evidence that the defendant did procure the loan from one Hawkins. At the close of the testimony the defendant moved for a direction of a verdict of acquittal, on the ground that "the indictment charges distinctly a larceny of a certain particular pin, and the evidence being perfectly clear that the pin was left with the defendant for the purpose of procuring a loan on it, that he did procure a loan on it, acting exactly within the scope of his authority, and doing precisely what it was left with him for, he cannot be convicted under this indictment of the larceny of this pin."

The court denied the motion, saying: "The complainant claims that there was no such authority conferred upon him" (the defendant), "that it was left with him for the purpose of sale and not for the purpose of pledging."

The defendant then asked the court to charge the jury as follows: "The indictment being for the larceny of a certain pin, if the jury believe that the complainant, being the owner of the pin, authorized the defendant to obtain a loan upon it, and the defendant did actually obtain that loan from Mr. Hawkins (the witness who has testified), as authorized by the complainant, they cannot convict the defendant under this indictment of the larceny of the pin."

The court declined to do so. The exception then taken presents the only question we think it necessary to consider. The proposi-

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tion presented by the request negated every ingredient of the offense charged, and if found in favor of the defendant would have made a conviction impossible. If the owner intended to part with the property for a special purpose, and the defendant used it only in the way prescribed, it could not be said to be stolen. There could have been neither a false pretense nor a felonious taking on his part. It is said however by the learned counsel for the respondent, that the request asked too much, because it did not take in the possible intent of the defendant, "at the time of procuring the loan," to appropriate the proceeds to his own use. This by no means answers the exception, for if found according to the propositions of the request, it would appear that the defendant received the property lawfully and disposed of it according to the wish of the owner, that he not only obtained the loan, but obtained it as authorized. The request might have been amplified, but it was unambiguous, and contained a proposition good in law and to the benefit of which the defendant was entitled. An omission to account for the proceeds of the loan could not, by relation, change the voluntary act of the owner in parting with the pin into a larcenous taking by the defendant, nor sustain the allegation upon which the indictment stood, that the defendant "feloniously did steal, take and carry away" the property in question. There may have been a breach of trust and even fraudulent conversion of the proceeds of the loan, but that does not constitute the offense charged. The exception was well taken.

The judgment and conviction should therefore be reversed and a new trial granted.

All concur.

Judgment and conviction reversed.

KALBFLEISCH V. LONG ISLAND RAILROAD CO.

(102 N. Y. 530.)

Negligence — contributory — exposing inflammable material.

The plaintiff carried on a varnish factory adjoining defendants' railway, and in the manufacture exposed benzine out of doors on his premises, which was ignited by sparks from defendants' engine, and caused the destruction of the factory. *Held*, that plaintiff was not negligent.*

* See *Pittsburgh, etc., Ry. v. Jones* (86 Ind. 496), 44 Am. Rep. 334.

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A MOTION for burning a factory. The head-note states the case. The plaintiff had judgment below.

William J. Kelly, for appellant.

William M. Dykman, for respondents.

DANFORTH, J. The defendant, at the close of the plaintiffs' case, moved the trial judge to dismiss the complaint on the ground "that the taking out of inflammable benzine was contributive negligence. Also that there is no evidence that the fire came from the defendant's engine." The motion was denied, and an exception then taken raises the only question we can consider. It appeared that the plaintiff was the owner of certain buildings in Brooklyn, adjoining the tracks and station of the defendant, which he leased to one Lewis Kupper, who used them as a varnish factory. In September, 1882, the latter was engaged in making black varnish and had commenced thinning it down with benzine. It was giving off vapor. At that time defendant's train stopped at the station to let off its passengers, "when," according to one witness, "she started off again and commenced to puff," and he says, "I saw a flash come from the engine right into the kettle and it was all on fire;" "the train had just got in front of our place when it catched on fire." "I looked up," he says, "and the vapor was afire." This was about 1 o'clock. The fire on plaintiffs' premises had been extinguished at eleven, and there was no fire in the neighborhood, except as it was emitted from the locomotive. That its condition permitted this escape was established by its engineer, who testified "that the wire netting" of the smoke-stack was out of order; "it was," he says, "split lengthwise of the smoke-box about a foot and a half, and through working the engine it opened it out and made a space there, I should say, very near a foot wide and a foot and a half long—open in the netting; this netting is supposed to be a spark arrester; it is right underneath the smoke-stack on the upper part of the smoke-box, under the stack on the inside of the smoke-box; that was the only thing there was there to arrest the sparks; I know of this engine having set fire to lots of fences and one thing and another along the road that I know of; I knew it would set fire to fences about the beginning of September or the latter part of August of the same year."

On cross-examination by defendant's counsel, he testified that a week before the fire he reported this break when it first occurred to the master mechanic, and after the fire it was patched up.

"The effect of such a hole as I have described would be that all the sparks would come through the flues and would escape through the opening; where if the vent was closed the sparks would be arrested; I think it would increase the amount of sparks thrown largely — more or less; it increased the sparks coming out of this engine."

This was the condition of the case when the motion referred to was made, and it is a complete answer to it, unless the mere location and use of a railroad are to operate as an absolute prohibition upon certain branches of industry in its vicinity. By purchase such dominion might be acquired, but that is not pretended. In *Fero v. Buffalo and State Line R. R. Co.*, 22 N. Y. 209, 215, the court found it difficult to maintain the proposition that one could be guilty of negligence while in the lawful use of his own property upon his own premises, but in the case before us the claim is advanced that the mere taking out and use of an article necessary in the manufacture carried on upon the plaintiffs' premises, put them beyond the protection of the law. In view of the fact that no impediment was offered to the freest discharge of sparks from the defendant's engine, and the testimony of the eye witness that the fire causing the injury came from it, the two grounds on which the defendant sought to arrest this case were equally untenable. *Fero's case, supra*; *Cook v. Champlain Transportation Co.*, 1 Den. 91. The exception is therefore unavailing. But the record shows that the plaintiff afterward gave evidence and the case was submitted to the jury in a manner satisfactory to the defendant, and in the absence of any request for a further charge, it must be presumed that the instructions given covered every point then thought by the defendant to be material. No exception other than the one above referred to was taken at the trial.

The judgment appealed from should be affirmed.

All concur.

Judgment affirmed.

Fitzsimmons v. City of Brooklyn.

FITZSIMMONS V. CITY OF BROOKLYN.

(103 N. Y. 538.)

Office and officer — deducting from salary for earnings while improperly removed.

A city policeman, receiving an annual salary, was improperly removed and afterward restored. During his removal he earned money in other employments. *Held*, that this should not be deducted from his unpaid salary.

ACTION for balance of salary. The opinion states the case. The plaintiff had judgment below.

Almet F. Jenks, for appellant.

Charles J. Patterson, for respondent.

FINCH, J. This case presents the question whether an officer entitled by law to a fixed annual salary, but prevented for a time by no fault of his own from performing the duties of his office, and earning during that time the wages of another and different employment, must deduct them from his recovery when he sues for his unpaid salary. It is quite true that the question is not raised by the pleadings, but no objection was interposed on that account. The necessary facts were proved or admitted, and upon them the question was presented to and decided by the trial court and an exception taken to that decision. If the question of pleading had been raised the difficulty might have been obviated, and an issue tried and determined by the consent of both sides, irrespective of the shape of the pleadings, cannot be thrust out of the case upon an appeal.

The plaintiff was a policeman of the city of Brooklyn, duly appointed to that office and having entered upon the performance of its duties. He was attempted to be removed from office by the police commissioners, but upon a *certiorari* the order of a removal was reversed and the plaintiff restored to his office. Between the order of removal and that of restoration he rendered no service as policeman, because not permitted so to do, but during the interval resumed for a time his old occupation as a machinist, and that failing, engaged in work at Schutzen park, the character of which is not disclosed; and from these two sources earned, during the

period of his removal, the sum of \$500. The defendant conceded that plaintiff was entitled to recover the unpaid salary of his office, but insisted that his earnings of \$500 should be applied upon and deducted from it. The court refused the deduction, the General Term affirmed the judgment, and the defendant brought this appeal.

The rule sought to be applied by the city to the claim of the plaintiff finds its usual and ordinary operation in cases of master and servant and landlord and tenant; relations not at all analogous to those existing between the officer and the State or municipality. The rule in those cases is founded upon the fact that the action is brought for a breach of contract and aims to recover damages for that breach, or compensation for the servant's loss actually sustained by the default of the master. That loss he is required to make as small as he reasonably can. His discharge without just cause is not a license for voluntary idleness at the expense of the master. If he can obtain other employment he is bound to so, and if he engages in other service, what he thus earns reduces his loss flowing from broken contract. But this rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the State or municipality by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and when improperly withheld he may sue for it and recover it. When he does so he is entitled to its amount, not by force of any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown. We think therefore it has no application to the case at bar, and the courts below were right in refusing to diminish the recovery by applying the wages earned.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

Geisner v. Lake Shore and Michigan Southern Railway Company.

**GEISNER V. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY
COMPANY.**

(100 N. Y. 503.)

Carrier — delay in transportation caused by strikers.

A railroad company is not responsible for delay in the transportation of merchandise caused by the violence and intimidation of former employees who had struck, and quit the employment.

ACTION for delay in transporting live stock. The opinion shows the case. The plaintiff had judgment below.

Daniel H. McMillan, for appellant.

Adelbert Moot, for respondent.

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this cause.

A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and to forward the goods to their destination; and so it has been uniformly decided. *Wibert v. N. Y. & Erie Railroad Co.*, 13 N. Y. 245; *Blackstock v. N. Y. & Erie Railroad Co.*, 20 N. Y. 48; s. c., 75 Am. Dec. 372.

In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the

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men engaged in the violent and riotous resistance to the defendant were its employees for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service or in any sense its agents, for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employees who were willing to serve it. They became a mob of vicious law breakers to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employees of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not, if it be true, that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that they were not in its service or seeking to promote its interests or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment and seeking their own ends and not the interests of the defendant. The mischief did not come from the strike—from the refusal of the employees to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. *Pittsburgh & C. R. Co. v. Hazen*, 84 Ill. 36; s. c., 25 Am. Rep. 422; *Pittsburgh, C. W. L. R. Co., v. Hallowell*, 65 Ind. 188; s. c., 32 Am. Rep. 63; *Bennett v. Lake Shore, etc., R. Co.*, 6 Am. & Eng. R. Cas. 391; *I. & W. L. R. Co. v. Junken*, 10 Bradwell, 295.

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The cases of *Weed v. Panama R. Co.*, 17 N. Y. 362; s. c., 72 Am. Dec. 474, and *Blackstock v. N. Y. & Erie R. Co.*, 1 Bosw. 77; affirmed, 20 N. Y. 48; s. c., 75 Am. Dec. 372, do not sustain the plaintiff's contention here. If in this case the employees of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are therefore of opinion that this judgment should be reversed and a new trial granted, costs to abide event.

All concur:

Judgment reversed.

MAYOR, ETC., OF NEW YORK V. SECOND AVENUE RAILROAD COMPANY.

(108 N. Y. 572.)

Evidence — memorandum — time-book.

Plaintiff called as a witness W., the foreman who had general charge of the work, under whom were two gang foremen, each having charge of a separate gang of laborers. W. kept a time-book in which was entered the name of each laborer. He visited the work twice a day, and while there he checked on the time-book the time of each laborer as reported to him by the gang foremen, who did not see the entries. He also marked the men's names as he saw them and knew their faces. The gang foremen testified that they correctly reported to W. the names of the laborers, and if any did not work full time they reported that fact also. Upon this proof the time-book was admitted in evidence. *Held*, no error.

A written memorandum of materials used was admitted in evidence. W., the foreman, testified that he made the entries from daily information given him by the gang foremen, and that he entered the amounts as reported. The gang foremen testified that they reported the amounts correctly; neither saw the entries made or had any present recollection of the specific quantities so reported. It was inferable from the testimony of one of them that when the reports were made he had personal knowledge of the facts reported. *Held*, competent.

ACTION for breach of contract. The opinion states the point. The plaintiff had judgment below.

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Austin G. Fox, for appellant.

D. J. Dean, for respondent.

ANDREWS, J. [Omitting other points.] A more serious question is raised by exception to the admission in evidence of a time-book kept by one John B. Wilt, and of a written memorandum or account made by him, offered to prove the number of days' work performed and the quantity of material used. Wilt was a foreman in the employ of the department of public works, and had general charge of the repairs in question. Under him were two gang foremen, or head pavers, Patrick Madden and Charles Coughlan, each having charge of a separate gang of about ten men employed on the work. Wilt kept a time-book, in which was entered the name of each man employed. He visited the work twice a day, in the morning and afternoon, remaining from a few minutes to half an hour each time, and he testified that while there he checked on the time-book the time of each man, as reported to him by the gang foremen. He also testified that he marked the men's names as he saw them, and that he knew their faces. The gang foremen did not see the entries made by Wilt, but they testified that they correctly reported to him each day the names of the men who worked, and if any did not work full time, they reported that fact also. Upon this proof the trial judge admitted the time-book in evidence against the objection of the defendant. The trial judge also admitted in evidence, under like objection, a written memorandum or account, in the handwriting of Wilt, of materials used. Wilt testified that the entries in the account were made from daily information furnished by the gang foremen, on the occasions of his visiting the work, and that he correctly entered the amounts as reported. It does not appear that he had any personal knowledge of the matters to which the entries related. The gang foremen were called as witnesses in support of the account. Neither of them saw the entries, and on the trial neither claimed to have any present recollection of the specific quantities so reported by them. Madden testified that he reported the correct amounts to Wilt, and it is inferable from his evidence that when the reports were made he had personal knowledge of the facts reported. Coughlan also testified in general terms that he reported the items correctly. But on further examination it appeared that his

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reports to Wilt of the stone delivered at the work were made upon information derived by him from the carmen who drew the stone, and who counted them, and who reported the count to Coughlan, who in turn reported to Wilt. Coughlan saw the carmen dump the stone, but he did not verify the count, but appears to have assumed its correctness. The carmen who delivered the stone were not called as witnesses.

The exception to the admission of the time-book presents a question of considerable practical importance. The ultimate fact sought to be proved on this branch of the case was the number of days' labor performed in making the repairs. The time-book was not admissible as a memorandum of facts known to Wilt and verified by him. His observation of the men at work was casual, and it cannot be inferred that he had personal knowledge of the amount of labor performed. His knowledge, from personal observation, was manifestly incomplete, and the time-book was made up mainly, at least, from the reports of the gang foremen. The time-book was clearly not admissible upon the testimony either of the gang foremen, or of Wilt, separately considered. The gang foremen knew the facts they reported to Wilt, to be true, but they did not see the entries made, and could not verify their correctness. Wilt did not make the entries upon his own knowledge of the facts, but from the reports of the gang foremen. Standing upon his testimony alone, the entries were mere hearsay. But combining the testimony of Wilt and the gang foremen, there was, first, original evidence that laborers were employed, and that their time was correctly reported by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions, to which the reports related, and second, evidence by the person who received the reports, that he correctly entered them as reported, in the time-book, in the usual course of his business and duty. It is objected that this evidence, taken together, is incompetent to prove the ultimate fact, and amounts to nothing more than hearsay. If the witnesses are believed, there can be but little moral doubt that the book is a true record of the actual fact. There could be no doubt whatever, except one arising from infirmity of memory, or mistake or fraud. The gang foremen may, by mistake or fraud, have misreported to Wilt, and Wilt may either

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intentionally or unintentionally have made entries not in accordance with the reports of the gang foremen. But the possibility of mistake or fraud on the part of witnesses exists in all cases and in respect to any kind of oral evidence. The question arises, must a material, ultimate fact be proved by the evidence of a witness who knew the fact and can recall it, or who, having on personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made an entry of the fact at the time, or recently thereafter, which on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made, or may such ultimate fact be proved by showing by a witness that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time, but had forgotten them, and supplementing this testimony by that of the person receiving the communication to the effect that he entered at the time the facts communicated, and by the production of the book or memorandum in which the entries were made. The admissibility of memoranda of the first-class is well settled. They are admitted in connection with, and as auxiliary to the oral evidence of the witness, and this whether the witness, on seeing the entries, recalls the facts, or can only verify the entries as a true record made or seen by him at, or soon after the transaction to which it relates. *Halsey v. Sinsbaugh*, 15 N. Y. 485; *Guy v. Mead*, 22 N. Y. 462.

The other branch of the inquiry has not been very distinctly adjudicated in this State, although the admissibility of entries made under circumstances like those in this case was apparently approved in *Payne v. Hodge*, 71 N. Y. 598. We are of opinion that the rule as to the admissibility of memoranda may properly be extended so as to embrace the case before us. The case is of an account kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foremen that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts that business transactions in numerous cases are authenticated, and

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business could not be carried on and accounts kept in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must in most cases or necessity be kept by a person not personally cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account. It may be assumed that a system of accounts, based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified, as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is often necessary to prevent a failure of justice. We are of opinion however that it is a proper qualification of the rule admitting such evidence, that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested. In *Peck v. Valentine*, 94 N. Y. 569, the memorandum there admitted was not an original memorandum, but a copy of a private memorandum made by an employee of the plaintiff for his own purposes, and not in the course of his duty, or in the ordinary course of business. The original memorandum was delivered by the one who made it to the plaintiff, who lost it, but testified that the paper produced and received in evidence was a copy. The person who made the original memorandum was unable to verify the copy. The court held that the copy was improperly admitted in evidence. The decision in *Peck v. Valentine*, rests upon quite different facts from those in this case.

In respect to the admission of the account of material, we think that part of the account based upon the reports of Madden was admissible on the same grounds upon which we have justified the admission of the time-book. Madden, in substance, testified that he knew the facts and properly reported them, and Wilt testified that he entered them as reported. The part of the account of materials, the items of which were furnished by Coughlan, was not

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strictly admissible. Coughlan does not appear to have had personal knowledge of the quantity of stone delivered on his part of the work, but took the count of the carman, and his reports to Wilt were based upon the reports of the carman to him. The carman was not called, and the evidence of Wilt and Coughlan was mere hearsay. If the attention of the court had been called by the defendant to this part of the account, and objection had been specifically taken to the items entered upon the reports of Coughlan, the objection would, we think, have been valid. But the objection was a general objection to the whole account. It was clearly admissible as to the items reported by Madden, and we think the general objection and exception is not available to raise the question as to the admissibility of the items entered on the report of Coughlan, independently of the others. The whole amount of materials embraced in the recovery was small, and we think no injustice will be done by affirming the judgment.

The judgment should therefore be affirmed.

All concur.

Judgment affirmed.

STEWART V. LONG ISLAND RAILROAD COMPANY.

(108 N. Y. 601.)

Landlord and tenant—tenant sub-letting or assigning lease—liability of assignee to landlord.

Where a lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and its character is not destroyed, by the reservation therein of a new rent to the assignor with a power of re-entering for non-payment, or by its assumption of the character of a sub-lease; and the assignee, so long as he continues to hold the estate, is liable directly to the landlord on all covenants in the original lease which run with the land, including the covenant to pay rent.

An estate to arise *in futuro* cannot be tacked on to the estate of a lessee who has assigned his whole term, so as to create a reversion in him and establish the relation of landlord and tenant between him and his assignee, so far as strictly reversionary rights are concerned, or prevent that relation from existing between the assignee and the original landlord.

ACTION for rent. The opinion shows the case. The defendant had judgment below.

Stewart v. Long Island Railroad Company.

Samuel Hand, for appellant.

E. B. Hinsdale, for respondent.

RAPALLO, J. The only question in this case is whether the defendant, by entering into the contract of May, 1876, with the Flushing, North Shore and Central Railroad Company, came into such a relation with the original lessor of the railroad in question, represented by the plaintiff, as to subject it to liability directly to her for the rent reserved by the original lease of January, 1873, from her deviser, Alexander T. Stewart, to the Central Railroad Company of Long Island. The facts are so fully stated in the opinion of my learned brother FINCH, J., that it is not necessary to repeat them in detail.

That the contract of A. T. Stewart with the Central Railroad Company of Long Island, dated January, 1873, was a lease of the road for the term of fifty years, cannot, I think, be disputed, thus far in the discussions in this court it has been conceded. The annual rent reserved was a percentage upon the agreed cost of the road, liable to be augmented by a percentage upon such further expenditures as might be made by the landlord during the term. If this had been all of the contract there would have been no difference of opinion between us; but it contained further provisions which have given rise to the present discussion.

The ordinary covenant to surrender the demised premises on the last day of the term was made subject to the further provisions of the contract, which were that the lessee covenanted at the expiration of the said term of fifty years from January 7, 1873, to pay to the lessor the principal sum by him expended on the road, and that upon such payment, but not before, the payment of rent should thereafter cease, such rent however to be paid up to such time, and that upon such payment of such principal sum the lessee, its successors or assigns, should not surrender the demised premises, but should be vested with the fee-simple of the right of way and all the property appurtenant thereto, owned by the lessor, and that the contract should thereupon, and upon such payment, be deemed a sufficient grant or deed of conveyance, and that the lessor should then execute such further deed as might be necessary, etc.

Until the payment of the principal sum however, the rent was to continue, and the lease contained the usual provisions for re-entry

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for non-payment of rent or the breach of the other covenants in the instrument, which were numerous.

In June, 1874, the entire interest of the Central Company, under this lease and contract, became vested in the Flushing, North Shore and Central Railroad Company, to whom the contract was assigned, and in May, 1876, the latter company entered into the agreement with the defendant which is set forth in the opinion of FINCH, J., and the effect of which is now in question. The main feature of that agreement, to which it is necessary for the purposes of this discussion to refer, is that the last-named company leased to the defendant the whole of the property which was demised by Stewart to the Central Railroad Company, and for a term longer than that of the original lease, viz., for the term of ninety-nine years. It thus transferred to the defendant the entire term during which the Central Railroad Company was to hold the demised premises as lessee of Alexander T. Stewart, and left no particle of that term in the original lessee or in its first assignee, the Flushing, North Shore and Central Railroad Company, and the question now before us is, whether it operated, as between the original lessor, Stewart, or his devisee, and the defendant, as an assignment of that entire term, and thus established a privity of estate between them which rendered the defendant liable to the original lessor, or whether it was, as between those parties, a mere sub-lease under which the defendant was liable only to its immediate lessor.

The rules relating to the effect of an assignment of a lease are so well settled that it is hardly necessary to do more than refer to them. Where a lessee assigns his whole estate, without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee, on the covenant to pay rent, or any other covenant in the lease which runs with the land; but if the lessee sublets the premises, reserving or retaining any such reversion, however small, the privity of the estate is not established and the original landlord has no right of action against the sub-lessee, there being neither privity of contract nor of estate between them. Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is in legal effect an assignment of the original lease, or a mere sub-lease. The question has frequently, and probably most generally, arisen between the lessee and his transferee, and much confusion will be

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avoided by observing the distinction between those cases, and cases where the question has been between the transferee and the original landlord. In the latter class of cases the rule is well settled that if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and the essence of the instrument as an assignment, so far as the original lessor is concerned, will not be destroyed by reserving a new rent to the assignor with a power of re-entering for non-payment, nor by its assuming, by the use of the word demise or otherwise, the character of a sub-lease; and the assignee, so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the covenant to pay rent. *Taylor's Landl. & Ten.* (7th ed.) 109; *Hicks v. Downing*, 1 Lord Raym. 99; *Palmer v. Edwards*, 1 Doug. 187; *Smith v. Mapleback*, 1 T. R. 441; *Porter v. French*, 9 Irish Law R. 514; *Parmenter v. Weber*, 8 Taunt. 593; *Doe v. Bateman*, 2 Barn. & Ald. 168; *Wallaston v. Hakewell*, 3 Scott N. R. 616; *Pluck v. Digges*, 5 Bligh (N. S.), 31; *Baumont v. Marquis of Salisbury*, 19 Beav. 198; *Thorne v. Woolcombe*, 3 Barn. & Ald. 586.

But as between the original lessee and his lessee or transferee, even though the original lessee demises his whole term, if the parties intend a lease, the relation of landlord and tenant, as to all but strictly reversionary rights, will arise between them.

The effect therefore of a demise by a lessee for a period equal to or exceeding his whole term is to divest him of any reversionary right and render his lessee liable, as assignee, to the original lessor, but at the same time the relation of landlord and tenant is created between the parties to the second demise, if they so intended. *Taylor Landl. & Ten.* (7th ed.) 109, note *s*, 16 *n.* 5; 1 Washb. Real Estate, 515 (4th ed.), *n.* 6; *Adams v. Beach*, 1 Phil. 99, 178; *Indianapolis, etc., R. Co., v. Cleveland etc., R. Co.*, 45 Ind. 281; *Lee v. Payn*, 4 Mich. 106; *Lloyd v. Cosens*, 2 Ashm. 138; *Wood Landl. and Ten.* (Banks' ed.), § 347. These rules are fully recognized in this State. *Prescott v. De Forest*, 16 Johns. 159; *Bedford v. Terhune*, 30 N. Y. 453, 457; *Davis v. Morris*, 36 N. Y. 569; *Woodhull v. Rosenthal*, 61 N. Y. 382, 391, 392.

There can be no doubt that in the present case the original lessee of Stewart parted with its whole term of fifty years and that the defendant acquired it. The Central Railroad Company as-

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signed the entire contract, embracing the term of fifty years as well as the right of purchase of the fee at the end of fifty years, to the Flushing, North Shore and Central Railroad Company, and I do not understand it to be denied by any one that that company became liable to Stewart directly on the covenants in the lease as assignee of the entire interest of the lessee. But the Flushing, North Shore and Central Railroad Company, by its contract with the defendant, did not assign to the latter the right of purchase at the end of the term of fifty years. It however leased the road to the defendant for the term of ninety-nine years, and the defendant covenanted to surrender the demised premises to its immediate lessor at the end of the ninety-nine years. That term however being greater than the term of fifty years granted in the original lease, the instrument operated as an assignment of that term, and left no reversion therein in the Flushing, North Shore and Central Railroad Company, consequently during the continuance of the term of fifty years there was a perfect privity of estate between the defendant and the original lessor, and the legal estate in reversion was in the original lessor during the fifty years, and he or those succeeding to his estate were both legally and equitably entitled to the rents and had a right of action therefor directly against the defendant by reason of this privity of estate.

It is contended that the Flushing, North Shore and Central Railroad Company, as the assignee of the Central Railroad Company, had more than the term of fifty years granted in the original lease because it was also assignee of the contract of Stewart by which, in case at the end of the term the Central Railroad Company should have performed the covenants in the lease and should then pay to Stewart the principal sum expended by him in the construction of the road, the contract should operate as a conveyance in fee of the demised premises. That under this contract the Flushing, North Shore and Central Railroad Company was the equitable owner of the fee as well as of the term, and was in possession under both titles when it leased to the defendant; that the lease to the defendant, being for only ninety-nine years, did not transfer its entire interest in the premises, but left in it a reversion at the expiration of that term, at which time the defendant covenanted to surrender to it, and consequently its lease to the defendant was not an assignment but a sub-lease. The argument would be very forcible if the question arose between the defendant and the Flushing, North

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Shore and Central Railroad Company, and were whether the relation of landlord and tenant subsisted between them. But it has no application to the question upon which this case turns. The equitable estate in reversion claimed to be in the Flushing, North Shore and Central Railroad Company as purchaser, is not a reversion in the term of fifty years. The whole of that term has been transferred to the defendant, not a particle of it is retained by its immediate lessor, and there is absolutely nothing intervening between the estate of the defendant, as assignee of the lessee for the fifty years, and the legal estate in reversion of the original lessor or his devisee; and the right to the rents follows that legal estate in reversion. The owners of the equitable estate claimed have no right, legal or equitable, to the rents. During the term of fifty years the original lessor or his devisee are entitled to them, and the whole term of fifty years being vested in the defendant, it is directly liable to the holder of the legal estate in reversion, there being a privity of estate between them. If a present equitable right to the rents vested in the same parties in whom the equitable estate in reversion is alleged to be vested, different questions might arise. The fact that the lease to the defendant reserves a different rent from that reserved in the original lease, with a clause for re-entry, cannot affect the question as between the parties to the present controversy, of its operating in law as an assignment of the term.

These points were expressly adjudicated in the cases of *Doe v. Bateman*, 2 Barn. & Ad. 168; *Wollaston v. Hakewell*, 3 Scott N. R. 616. Neither can the covenant to surrender have any bearing. It was a covenant to surrender at the expiration of the ninety-nine years' lease long after the expiration of the fifty years' lease. Where in an assignment of a lease or in a demise by the lessee for the same term as that granted by the original lease, there is a covenant to surrender to the assignor, this has in some cases been held to prevent the sub-lease from operating as an assignment; but this has been because the whole instrument, taken together, has been held to reserve to the original lessee some fragment of the original term, though almost inappreciable in point of duration, as in the case of *Post v. Kearney*, 2 N. Y. 394; s. c., 51 Am. Dec. 303, where the assignee of a lease demised the premises for the residue of his term, reserving the right to a delivery of possession by his assignee to him on the last day of the term, and a right to intermediate possession in case the buildings should be destroyed by fire. These reserva-

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tions were held sufficient to characterize the demise as a sub-lease and not an assignment. The right to possession on the last day would leave a fragment of that day of the term in the assignor, and was sufficient to create a technical reversion and thus prevent a privity of estate between his lessee and the original lessor.

In *Collins v. Hasbrouck*, 56 N. Y. 157; s. c., 15 Am. Rep. 407, the sub-lease was of part of the demised premises and was for only two years and seven months out of a term of ten years and expired four years before the original lease, but the sub-lessee had the privilege of four years more, provided he gave two months' notice. The action was ejectment brought by the original lessor against an assignee of the second lessee, claiming that the original lease had been forfeited by the breach of a covenant, on the part of the lessee, which it contained, that he would not sub-let or re-let the demised premises or any part thereof without written consent, etc., under penalty of forfeiture of the term, and the sub-lease before referred to was claimed to be a breach of that covenant. The judgment below was for the landlord but it was reversed in this court on the ground that the alleged forfeiture had been waived by the landlord. In the opinion, the question is discussed whether the sub-lease amounted to an assignment of the term of the original lease, or a mere sub-letting or re-letting of part of the demised premises. This question, in view of the result reached on the question of waiver, ceased to be controlling, but in discussing it the learned judge delivering the opinion made some remarks touching the effect of reserving a new rent in the sub-lease, and of reserving to the original lessee a right of re-entry for a breach of condition by his lessee, which have given rise to some confusion. The features of the instrument, which are above referred to, would be proper subjects of consideration for the purpose of determining whether the relation of landlord and tenant was created as between the original lessee and his lessee, and bore upon the question then before the court, viz.: Whether the second lease was a sub-letting or re-letting of part of the demised premises, which constituted a breach of the covenant not to sub-let or re-let. But the question of privity of estate between the original lessor and the lessee of his lessee was not in the case. The determination of the question depends upon whether the whole of the term of the original lessee became vested in his lessee, and the circumstances that the second lease reserves a different rent or a right to re-entry for breach of condition are

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immaterial. *Doe v. Buteman*, 2 Barn. & Ad. 168; *Wollaston v. Hakewell*, 3 Scott's N. R. 616; *Prescott v. De Fbrest*, 16 Johns. 159; *Bacon Abr.*, Leases, 1, 3; *Palmer v. Edwards*, 1 Doug. 187; *Smith v. Mapleback*, 1 Term R. 441; *Smiley v. Van Winkle*, 6 Cal. 605; *Loyd v. Cozens*, 2 Ashm. 138; 2 Preston Con. 124; *Taylor Landl. and Ten.* (7th ed.), § 109; 1 Washb. Real Prop. 515, § 6. The cases which hold that where a lessee sub-leases the demised premises for the whole of his term, but his lessee covenants to surrender to him at the end of the term, the sub-lease does not operate as an assignment, proceed upon the theory that by reason of this covenant to surrender some fragment of the term remains in the original lessor. In most of the cases, and in the earlier cases in which this doctrine was broached, the language of the covenant was that the sub-lessee would surrender the demised premises on the last day of the term.

In *Piggott v. Mason*, 1 Paige, 412, by the original lease, the lessee had thirty days after the expiration of the lease to remove buildings from the demised premises. His assignee sub-leased for the residue of the term, and his lessee covenanted to surrender possession "on the last day of the term."

In *Post v. Kearney*, 2 N. Y. 394; s. c., 51 Am. Dec. 303, the covenant of the sub-lessee was that "on the last day of his term he would surrender the possession of the demised premises to his lessor." Page 395.

Some fragment of that last day was therefore reserved to the original lessee, for he was entitled to the surrender during some portion of the last day. This was held sufficient to establish a technical reversion in the original lessee and thus prevent a privity of estate from arising between his lessee and the original landlord. The same theory has been subsequently adopted in cases where the language of the covenant has been that the second lessee would surrender to his lessor at the expiration of the term of the sub-lease, without adverting to any distinction.

In *Ganson v. Tiff*, 71 N. Y. 48, 54, the sub-lease provided that at the expiration of the term, or other sooner determination of the demise, the lessee should surrender the demised premises to the lessor, and the court say: "This constitutes a sub-lease of the premises, and not an assignment of the entire term."

It is obvious that the covenant to surrender cannot, in the present case, have the effect which was given to it in the cases cited,

for it was to surrender at the expiration of a term of ninety-nine years, the original lease being for only fifty years, and there is no theory upon which it can be pretended that any vestige of that term or of any reversion therein remains in the lessor of the defendant.

The agreement to transfer the fee to the lessee did not merge the term of fifty years, nor to prevent the relation of landlord and tenant subsisting between the original lessee or its transferee of the term, during its continuance. The lessee was to become entitled to the fee only in case it performed the covenants and paid the principal of the cost of the road, and the lease provides in terms that on such payment being made, but not before, the rent reserved in the lease shall cease. The payment of this principal sum at the end of the fifty years, as well as of the other sums reserved, was by the very terms of the contract made a condition precedent to the vesting of the fee in the lessee. In this respect the case does not differ in substance from *Bostwick v. Frankfield*, 74 N. Y. 207, where a similar covenant to convey a fee to the lessee was held not to create an equitable estate in fee in the lessee, in which his estate as lessee merged, but that the lease remained in full force, and the relation of landlord and tenant continued, until performance of the contract of purchase, and the landlord was entitled to dispossess the lessee by summary proceedings against him as tenant. In that case it was held that the doctrine which treats an individual, who has contracted for the purchase of land as the owner, could not be applied when the intention of the parties was clearly adverse to such a presumption, and that a provision in the contract, that unless carried out at the time named, it should become void, negatived such an intention. Here the provision is that the lessee shall hold as tenant for the term of fifty years, paying rent, and at the end of the fifty years the lessee shall pay to the lessor the principal sum by him expended upon the road, and that upon such payment "but not before" the rent should cease, such rent however to be paid up to such time, and upon such payment of the said principal sum the lessee to be vested with the title; the right to re-enter for non-payment of rent or breach of covenants being fully reserved.

These provisions plainly manifest an intention that no title, except an estate for years, shall vest in the lessee until the end of the term and the payment of the principal and all rent in arrears, and that in the meantime the fee and the reversion shall remain in the

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lessor. Until the expiration of the term the only estate which vested in the lessee was an estate for years, which was entirely separable from the right to acquire the fee. The lessee could assign the term and retain the contract for the purchase of the fee, and by such an assignment the assignee would be brought into privity with the original landlord who would be entitled to his action directly against the assignee of the term so long as it continued such assignee. It could divest itself of this liability at any time before rent had accrued by assigning over the term, but so long as it continued to hold the term it held as tenant of the original landlord, and was subject to be proceeded against as such. The original lessee, or the lessor of the defendant, as has been shown, retained no portion of the term and consequently no reversion. Whatever equitable rights it may have had were to arise *in futuro*. An estate to arise *in futuro* cannot be tacked on to the estate of a lessee who has assigned his whole term, so as to create a reversion in him and establish the relation of landlord and tenant between him and the person to whom he has assigned his term, so far as strictly reversionary rights are concerned, or prevent that relation from existing between such person and the original landlord.

In *Prescott v. DeForest*, 16 Johns. 159, Stewart leased a house to Satterlee for one year from the 1st of May, 1817. Satterlee then leased part of the house to the plaintiff at \$1,000 per annum, payable quarterly, for the same term for which he had taken it. On the 1st of February, 1818, Satterlee obtained a new lease of the house from the landlord for one year from the 1st of May, 1818. On the 2d of March, 1818, Stewart distrained the goods of the plaintiff on the premises for rent in arrears and sold them in due form, and the defendant became the purchaser. The right to distrain for rent was incident to and inseparable from the reversion, and it was held that Satterlee had no reversion; that the lease from him to the plaintiff, being for the whole of his own term, must be deemed an assignment and not an under-letting, although it was for only part of the premises, and reserved a new rent, payable to himself; that there was no privity of estate between him and the plaintiff, but privity of contract merely; that although at the time of the distress Satterlee had a second lease from May 1, 1818, to May 1, 1819, that extension of his term did not operate to vest a reversion in him because it was to commence *in futuro*, and in the meantime the reversion continued in Stewart, the original land-

lord, who by reason of privity of estate had the right to sue the plaintiff or distrain her goods for the rent due him. On this ground the distress by Satterlee was held void. So in the present case the title of the defendant's lessor, under the Stewart contract, to the fee of the demised premises, was not to commence until the end of the term of fifty years, and the payment of the purchase-money, and whatever equitable rights the defendant's lessor may have had under that contract, it is clear that in the meantime the legal estate in reversion continued in Stewart and his devisee, and the right to the rent followed the reversion. The contract was not a present sale of the fee, under which the equitable title vested in the purchaser and the title to the purchase-money in the vendor; but was for a sale to take place *in futuro*, that is, at the end of the fifty years. It was expressly stipulated in the Stewart contract that the rent payable to Stewart should cease at the end of the fifty years and not before, and that then on the payment of the stipulated sum the lessee should become vested with the fee. This was in substance a contract that Stewart's lessee should hold as his tenant under the lease until the expiration of the term, and that the other rights secured by the contract should then commence to operate. Whether they will then ripen into a title depends upon whether the lessor of the defendant performs the conditions precedent upon which the vesting of the title is conditioned.

In *Langford v. Semmes*, 3 Kay. & Johns. 220, a lessee for a term of ninety-nine years, with the option of purchasing the fee-simple in reversion, granted a lease for a term which exceeded the residue of his own term, and it was held that this lease established a privity of estate between the last lessee and the original lessor. The case is not precisely in point, because here there was an unconditional contract to pay the cost of the road at the end of the term, and that on such payment the title should vest, but nevertheless the vesting of the title was conditioned on the lapse of the fifty years, and on the payment being made at the end of the term. This contract however did not operate to enlarge the term of the original lease, it was separable from the estate for years held by the original lessee, and the transfer of the whole of that term to the defendant, while the legal estate in reversion, together with the legal and equitable right to the rents, were in the plaintiff, established a privity of estate between the defendant and the plaintiff which entitled her to maintain this action directly against the defendant

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on the covenant to pay rent contained in the original lease from Stewart.

The judgment of the General and Special Terms should be reversed and a new trial ordered, with costs to abide the event.

FINCH, J. (dissenting). The characteristic difference between an assignment of his lease and an under-letting by the original tenant resides in the inquiry whether as a result of the transaction the primary lessee has transferred his whole and entire estate and completely parted with his title, or has retained in himself some fragment or shred of his estate, either substantial or even formal and technical. An under-letting implies a constituted relation of landlord and tenant between the parties contracting; and that in turn the existence in the landlord of an estate superior to the leasehold and out of which the latter is carved; for there can be no tenure held of one whose title is utterly destroyed. This rule prevails even over the apparent intention, not because that intention ceases to be the test and standard of interpretation, but because an impossible intention is never presumed in preference to one possible and operative between the parties. The rule in its origin under the feudal system had a substantial and beneficial force. To the superior lord a service of fealty was due from the tenant in virtue of his tenure, and if the lessee could part with his whole estate to one holding only under him, the service of fealty was gone, and so in that case the new tenant was deemed to hold under the paramount title as an assignee of the lease, put in the place and room of the original tenant, and bound by his covenants to render his service. Of course that useful result has gone out of the doctrine, and it remains with us simply a rule of legal logic, much less deserving the power to override and pervert the discovered intention of the parties. As a consequence, a plain tendency to enforce that intention, even upon very narrow and technical grounds, has been developed. Originally a reversion in the primary lessee of some fragment of his estate was needful to support a sub-lease. It was said that it might be for a day, an hour or even a minute, but must nevertheless be, and leave in the primary lessee a reversion having a tangible existence. But that reversion now may be purely technical, and the product of reasoning rather than of substantial fact. It has been held that where the original tenant transferred for the identical term of his own lease, but the transferee cove-

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wanted to surrender to him, a reversion was implied from that fact, although no man can measure it as a tangible thing, since both surrenders, that of the sub-tenant to the primary lessee, and that of the latter to the original landlord, are due under the contracts at the same precise moment of time. *Collins v. Hasbrouck*, 56 N. Y. 157; s. c., 15 Am. Rep. 407; *Ganson v. Tift*, 71 N. Y. 48.

Indeed the cases cited seem to go further than that, and to hold that the reservation of a right of re-entry for breach of condition, and even the reservation of a new rent, makes the instrument a sub-lease. The case cited as to the effect of a re-entry (*Doe, ex dem. v. Bateman*, 2 Barn. & Ald. 168), so far from holding that a reserved right of re-entry necessarily implies a reversion, appears to me to hold the exact contrary, and to determine that such right may, and often does, exist by pure force of the contract and without the shadow of a reversion in the land. It is not necessary however to say whether the cases in our own State are in every respect soundly reasoned. It is quite obvious that they mean this at least, that the contract of the parties, construed according to their plain intention as expressed by it, shall prevail where upon such construction that contract is a possible one and can be rendered effective in subordination to established legal rules; and that where a sub-lease is manifestly intended, the court will search diligently and even closely for some trace of a reversion to support it.

Judgment reversed.

All concur with RAPALLO, J., except FINCH, J., dissenting, and RUGER, O. J., and MILLER, J., not voting.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MCPHERSON V. VILLAGE OF CHEBANSE.

(114 Ill. 46.)

Sunday — municipal ordinance — general law.

A village may ordain that places of business shall not be kept open on Sunday, although the general law only forbids such labor on Sunday as "disturbs the peace and good order of society."

ACTION for a penalty. The opinion states the case. The plaintiff had judgment below.

Wm. Potter and C. H. & C. B. Wood, for appellant.

Tracy B. Harris and Thos. S. Sawyer, for appellee.

SHELDON, J. This was a suit to recover from the defendant, who was engaged in the business of vending goods, wares and merchandise in the village of Chebanse, a penalty for keeping open his place of business in said village on Sunday, for the purpose above mentioned, in violation of an ordinance of the village prohibiting persons from keeping open their places of business in the village, for the purpose of vending goods, wares and merchandise on Sunday. In the County Court a demurrer was sustained to the declaration.

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ration, and judgment was given for the defendant. On appeal to the Appellate Court for the second district, the judgment was reversed, and an appeal taken to this court.

The only point made for the reversal of the judgment of the Appellate Court is, that the village had no power to pass the ordinance in question. Subdivision 66, of section 62, article 5 of the "Act to provide for the incorporation of cities and villages" (Rev. Stat. 1874, p. 221), gives the power "to regulate the police of the city or village, and pass and enforce all necessary police ordinances." Under this grant of power, we are of opinion there is found authority for the passage of the ordinance.

It is insisted this clause only refers to the organization and regulation of a police force. We think this a too narrow construction, that the clause is not limited in its application to police officers, but may extend to and embrace a subject matter of police regulation, under the general police power of the State. Unintermittent toil of body or mind is not the best condition of either. They have need of relaxation and periods of rest from labor, in order for their healthfulness and greatest working efficiency. From the antiquity and general extent of the practice of setting apart one day in seven as a day of rest, that would seem to be denoted as a suitable, if not the necessary requirement of the human economy as to the portion of time which should be given to rest from labor. Thus with the Jews, under the Mosaic code, we find one day in seven (the Sabbath) dedicated to an entire cessation from ordinary labor. Afterward we have the Lord's day. In A. D. 321, Constantine, by edict, ordered the suspension on Sunday of all business in the courts of law, except the manumission of slaves, and all other business except agricultural labor. In Great Britain, from early times, Sunday was set apart as not to be employed in secular labor. With respect to the transaction of judicial business, there came the legal maxim, *dies dominicus non est juridicus*. In the 29th of Charles II (A. D. 1678), after there having been passed several previous statutes prohibiting certain acts and business on Sunday, the statute was passed prohibiting the doing of any worldly labor, business or work of one's ordinary calling upon the Lord's day, works of necessity and charity excepted. In this country, statutes of a similar character, prohibiting labor on Sunday to a more or less extent, exist in most, if not all the States of the Union. Aside from the religious aspect, the appointment of

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the Sabbath merely as a day of rest from labor, stands recommended as a valuable institution of State policy.

Authorities are cited to the purport that a municipal corporation cannot, under any general grant of authority, adopt ordinances, which infringe the spirit of the State law, or are repugnant to the policy of the State, as declared in its general legislation; and as our statute (section 261 of the Criminal Code, Rev. Stat. 1874, page 391), goes only to the extent of forbidding such labor on Sunday as "disturbs the peace and good order of society," it is insisted that the ordinance goes beyond the State legislation on the subject, that it is inconsistent with and against the policy of the general statute. The police regulations of a village may differ from those of the State upon the same subject, if they be not inconsistent therewith. Cooley's Const. Lim. 198. The ordinance does not prohibit what the statute permits. There is no repugnancy between them. The ordinance may consist with the statute. The former differs from the latter in being more specific. We do not admit that the keeping open of the stores in a village on Sunday is allowable under the statute — that it would not disturb the peace and good order of society. Sunday, as it is observed by common usage, is not only set apart as a day of rest from labor, but it is devoted to religious worship. The consecration of the day to its wonted manner of observance is a blessing to mankind. Besides the recuperative effect referred to, it has its other beneficent uses. It affords opportunity for moral, intellectual and social culture. It is promotive of good habits, and tends to improve the manners of men. It is civilizing and refining in all its influences. Whatever detracts from the observance of the day, as it is customarily observed, is not to be countenanced. The keeping open by persons of their places of business in a community on Sunday, for the exercise of the business of their ordinary callings, is a public and serious interference with the observance of the day in its accustomed mode of observance. It is obstructive of the purposes which the day is set apart. It is offensive to the moral sense of the community. It disturbs the peace of society, in its open interference with the peace and quiet of a day devoted as a day of rest and for religious worship. It disturbs the good order of society, in publicly and flauntingly, and in defiance of public sentiment, desecrating a day, and inviting others to its desecration, set apart for purposes of the highest well-being of human society — hence:

the entire harmony of the ordinance with the statute. As a police regulation, in the interest of the good order and well being of the community, the ordinance in our opinion finds justification. See Cooley Const. Lim. 596, and authorities there cited.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CITY OF CHICAGO V. KEEFE.

(114 Ill. 222.)

Municipal corporation — defective sidewalk — injury to child playing.

There may be a recovery against a city for the death of a child caused by a defect in a sidewalk, although the child was rolling a hoop at the time. (See note, p. 864.)

ACTION for death of plaintiff's intestate by negligence. The opinion states the point. The plaintiff had judgment below.

Clarence A. Knight, for appellant.

A. W. Green and *M. W. Robinson*, for appellee.

SCHOLFIELD, O. J. Appellant asked the court to instruct the jury as follows: "The jury are instructed that the sidewalks of the city are not made for the purpose of a play-ground for children, nor as a mere place for the recreation of children, and that the condition of the sidewalk is only to be considered with reference to its use for the ordinary travel along the same.

"The jury are instructed that if they believe, from the evidence in this case, that the deceased, Michael Keefe, was at the time in question playing upon the sidewalk, by rolling a hoop along the same, then you are instructed that if you believe from the evidence, that he would not have fallen or have been injured if he had gone along the sidewalk in the ordinary mode, then you must find for the city, as the sidewalks are not made for the purpose of a play-ground for children."

But the court refused to give the instructions and this ruling presents the first and principal question discussed in the arguments before us.

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Counsel for appellant cite and rely upon *Stinson v. Gardner*, 42 Me. 248, and *Blodgett v. Boston*, 8 Allen, 287, in support of the instructions. These decisions are based upon the principle announced in *Blodgett v. Boston*, that the liability of towns and cities for injuries to persons or property occasioned by defects in highways is intended to be commensurate only with the duty imposed on them — that is, to keep them in repair, “so that they may be safe and convenient for travellers at all seasons of the year.” In the view of the New England courts there is no implied liability for injuries resulting from defective streets or sidewalks — the liability is wholly statutory. And as observed by Dillon, in his work on Municipal Corporations, § 786, “an important consequence is, that every case of this character must be within the statute.” See also notes on page 749, first edition. On the contrary, we hold, on principles of common law, that an action for damages resulting from negligence will lie against a municipal corporation if the duty to make repairs is fully declared, and adequate means are put within the power of the corporation to perform the duty. *Browning v. City of Springfield*, 17 Ill. 143; *Scammon v. City of Chicago*, 25 Ill. 424; *Clayburgh v. City of Chicago*, 25 Ill. 535; *City of Bloomington v. Bay*, 42 Ill. 503.

It is not attempted to be controverted in this case that the city of Chicago owes the duty to keep its streets, sidewalks, etc., in repair, and that this is the fact will be seen by reference to the various provisions of the general law in relation to the incorporation of cities, villages, etc., under which the city of Chicago is incorporated, applicable to this subject. Rev. Stat. 1874, ch. 24. Nor is it denied that the city had adequate means within its power for that purpose. There is no limitation in the statute that the streets shall be kept in repair “for travellers.” They are to be kept in repair as streets, and by necessary implication, for all the purposes to which streets may be lawfully devoted. We assume as self-evident that with us, streets are open to the use of the entire public as highways, without regard to what may be the lawful motives and objects of those traversing them — that those using them for recreation, for pleasure, or through mere idle curiosity, so that they do not impinge upon the rights of others to use them, are equally within the protection of the law while using them, and hence equally entitled to have them in a reasonably safe condition with those who are passing along them as travellers, or in the pur-

suit of their avocations. See *Donoho v. Vulcan Iron Works*, 7 Mo. App. 247, and same case in 75 Mo. 402. In crowded cities, their use for pleasure, and sometimes even for the promotion of health, may be regarded as a public necessity. On like principle, why may they not be used by children in play and amusement, so long as the rights of others being on or passing along the street shall not be prejudiced thereby? We can conceive no reason. Such use is certainly the universal custom, and the lawfulness of rolling hoops along streets, when not prohibited by ordinance, is impliedly conceded by the ninety-second subdivision of section 1, article 5, chapter 24, of the Revised Statutes, which empowers the common council to prohibit or regulate it by ordinance. The right to regulate necessarily assumes the lawfulness of that which is to be regulated — without regulation until it shall be prescribed, and in conformity with the regulation after it shall be prescribed. Since then there is not here shown to have been any ordinance either prohibiting or regulating the rolling of hoops, it is to be assumed that this child was, at the time he was injured, lawfully passing along the sidewalk — that the fact that he was rolling a hoop, while pertinent on the question of whether he was guilty of contributive negligence, did not, *per se*, deprive him of any right in respect of passage along the sidewalk which he would otherwise have had, and that the duty of the city toward him was precisely the same that it was toward a child of the same age and mental capacity, exercising the same degree of care, passing along the sidewalk without a hoop. Indeed, the rule seems to be, that although a party may be doing an unlawful act at the time he is injured through the negligence of another, this will not prevent a recovery, unless the act is of such a character as would naturally tend to produce the injury. *Sutton v. Town of Wauwatosa*, 29 Wis. 22; s. c., 29 Am. Rep. 534; Whart Neg. (2d ed.), § 995. Whether this child was guilty of contributory negligence was a question of fact to be determined by the jury from all the evidence in the case, and not a question of law, to be determined by the court from the circumstance that he was rolling a hoop. The law neither infers negligence, nor its absence, because he was rolling a hoop, since as a matter of fact, he may have rolled a hoop along the sidewalk and yet have observed the highest degree of care in passing along, i. e., it is not impossible that he may have done so, just as at another time, he may have been passing along the side-

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walk in a grossly negligent manner without a hoop, and on a business errand. The question of law is simply what is the degree of care he should have observed to entitle his administrator to recover: Whether, his conduct all considered, he observed that degree of care, was the question of fact.

[Minor questions omitted.]

Judgment affirmed.

ON APPLICATION FOR REHEARING.

PER CURIAM. A petition for rehearing has been presented in this case, and the argument in support of it has received careful consideration. We remain of the opinion heretofore announced. In what we have said we had reference only to the state of facts before the court. A sidewalk is for the passage of persons only; and we have not had in contemplation any use of it otherwise. Whether it be passed over for business or for pleasure, or merely to gratify idle curiosity, we think the use is lawful. A child may lawfully be upon the sidewalk for pleasure only, that is to say for play, and the city owes the same duty to have the sidewalk in a reasonably safe state of repair, in respect of it, that it does in respect of those who are on the sidewalk passing to or returning from their places of business or abode. It may be true that the child will be less careful in its mode of using the sidewalk while playing, than the business man will be while travelling to or from his place of business or abode; but this belongs to the domain of fact, and not to that of law. It may be so in most cases; it is not inevitably so in all cases. It is for the jury, not the court, to say what in a given case was the conduct of the parties.

Our attention is called to an expression used in *City of Chicago, v. Starr*, 42 Ill. 177, wherein it is said: "For it is to be borne in mind that it is not the duty of the city of Chicago to make its streets a safe play-ground for children. That is not the purpose for which streets are designed." This expression does not occur in the statement of a legal principle, nor in the argument of a legal proposition, but it occurs in an argument upon a question of fact, purely, namely, whether in that case the intestate was guilty of that degree of contributive negligence which precluded a recovery. At that time this court reviewed on questions of fact as well as of law, and often these questions were so intermingled in the discussion, that it requires some effort and care to distinguish between them. It was, in the case referred to, assumed as a mat-

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ter of fact that children, in playing, will be more careless than persons who are simply passing along, and the only legal proposition is one that is implied in the argument, and that is that the measure of duty of the city in regard to its streets is limited by the necessities of the ordinary modes of travelling or passing along the streets. If they were not kept up to this requirement, and children in playing did not subject them to greater burdens, or essentially different uses, certainly it was not contemplated that the fact of the children being at play should bar a recovery for injuries resulting from the condition of the streets. That this was the view is quite evident from *Kerr v. Forgue*, 54 Ill. 484; s. c., 5 Am. Rep. 146, where a recovery was had for an injury occurring to a child through negligence, although the child, at the time of the injury, was engaged in an act of play, in which case *Chicago v. Starr* is referred to and distinguished. The decisions of the lower court have, under the statutes now in force, relieved us of all questions of controverted fact, and in instructing a jury, trial courts are only authorized to instruct on questions of law. It is not proper to instruct on the facts, nor in the form of instructions, to argue the facts.

The rehearing is denied.

Rehearing denied.

NOTE BY THE REPORTER.—To same effect, *Hussey v. Ryan*, 64 Md. 426; s. c., 54 Am. Rep. 772; *McGuire v. Spence*, 91 N. Y. 308; s. c., 42 Am. Rep. 601, note.

A child, five or six years old, playing on a sidewalk, overturned upon himself a counter which was there and had been there several days. *Held*, that the city was not liable for the injury. *Kuns v. City of Troy*, 36 Hun, 615.

A boy, eight years old, carrying his father's dinner to him, crossed the street to look at some toys in a window just above a grating in the sidewalk, and turning to come away, caught his foot in the grating. *Held*, that the liability of the city was a question for the jury. *Hunt v. Salem*, 131 Mass. 294.

But in *Blodgett v. City of Boston*, 8 Allen, 237, it was *held*, that a boy, eleven years old, playing "old man on the castle," on a plank sidewalk, and injured by catching his foot between the planks, could not recover. The court said: "At the time of the accident by which he was injured, it cannot be said, in any just and proper sense, that he was a traveller or passer on the highway. He was not using it for the ordinary and legitimate purposes for which it was constructed, and to promote and facilitate which the duty of keeping it in repair is imposed on the city. * * * Suppose, for example, a juggler or gymnast should occupy a portion of a street or road to exhibit his feats of skill or agility and strength. He certainly could not be regarded in the light of a traveller while so using the highway. * * * A boy, while using a portion of the highway solely for the purpose of enjoying the amuse-

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ment of sliding over the snow in a sled, meets with an injury attributable to some defect arising from the accumulation of snow or ice. It would hardly be contended that the town or city in which such an accident happened could be held liable for the damages thereby occasioned. * * * We by no means intend to say that a child who receives an injury caused by a defect or want of repair in a road or street, while passing over or through it, would be barred of all remedy against a town, merely because at the time of the occurrence of the accident he was also engaged in some childish sport or amusement. There would exist in such a case the important element that the person injured was actually travelling over the way. But this element is wholly wanting in the case at bar."

So held of a child, six years old, who fell into a sewer while playing tag on the street. *Tighe v. City of Lowell*, 119 Mass. 472. So of a child, three or four years old, injured while sitting on the curb with her feet in the gutter. *Lyons v. Inhab. of Brookline*, 119 Mass. 491.

In *McCarthy v. Portland*, 67 Me. 167; a. c., 24 Am. Rep. 23, the court said: "A boy may be within the protection of the statute while running upon the street, if going to or returning from school; but not if participating at the time in a game of ball being carried on in the highway. He might be a traveller perhaps under some circumstance, while sliding down hill on his way to school; but not if merely engaged in sliding down hill as a pastime or sport. * * * Playing ball and sliding down hill are not unlawful exercises and games. But the streets are not proper places for such recreations."

So in *Stimson v. City of Gardiner*, 43 Me. 248, the same was held of a child injured while returning from school, in playing and scuffling on the street. The court said: "When children appropriate a part of the road for their sports, and cease to use it as a way for travel, the town or city through which the way passes is not responsible," etc. GOODENOW, J., dissented, observing: "We must expect of children the habits of children, and that they will be mirthful and joyous and sportive, while regularly on the way, as travellers, to and from school."

In *Donoho v. Vulcan Iron Works*, 75 Mo. 401, the plaintiff, eleven years old, on an errand for his mother, stopped to watch some boys playing in a sandbank in the street, but did not participate, and was injured by the fall of the bank. A direction that the plaintiff could not recover if he was using the street for the playing or amusing himself was held error, for the reasons assigned in 7 Mo. App. 447. There the court said: "If the plaintiff had abandoned his errand for the time being, and was actually engaged with the other boys in excavating the bank for amusement when the accident occurred, there might be room for the application of the doctrine that the city was no guarantor of the personal safety of one thus misusing the public thoroughfare. But if he was merely pausing in his errand because his attention was attracted for a moment to the occupation of his playmates, there can be no fairness in asserting that in that moment he was not properly on the highway, or using it for the purposes of its creation."

In *Britton v. Cunningham*, 107 Mass. 247, where a driver stopped to pick berries, it was left to the jury.

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(114 Ill. 312.)

Accretion—rule for apportionment.

The proper mode of apportioning accretions among riparian owners is the following: Measure the entire river front as it was when the lots were laid out, and note the aggregate number of feet frontage, as well as that of each lot; then measure a line drawn as nearly as may be with the middle thread of the stream opposite the shore line so measured; then divide the thread line into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures in feet on the shore line; and then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines.

EJECTMENT. The opinion states the case.

Edward C. Kehr, in person.

Wilderman & Hamill, for appellee.

MULKEY, J. This is an action of ejectment, brought by William H. Snyder, the appellee, against Edward C. Kehr, the appellant, to recover a triangular piece of land situate on the eastern bank of the Mississippi river, in East St. Louis, described in the declaration as "that part of lot 233, in the third subdivision of Cahokia commons, which lies west of the right of way of the East St. Louis and Carondelet railway, and extends to the center of the Mississippi river."

The third subdivision of Cahokia commons was laid out and platted by the proper authorities in 1860, under the provisions of the act of 1841 (see Laws of 1841, page 65), and constitutes a part of United States survey No. 759. The western tiers of lots of this subdivision is bounded on the west by the Mississippi river, and when laid off in 1860, the eastern bank of the river marked their shore line. Of these lots appellant owns No. 232, and appellee No. 233, the latter lying immediately north of the former, and both fronting the river. Since they were laid off in 1860, a large body of land, or accretions, has formed in front of said third subdivision of Cahokia commons, so that the shore boundary of these lots is

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not the same as it was in 1860, when laid out and platted. The strip of land in controversy is a part of these accretions, and whether it belongs to the plaintiff or to the defendant depends entirely upon what rule is to be adopted in making the division of the accretions. If the line dividing the lots of plaintiff and defendant as originally laid off, and terminating on the shore line as it then existed, is to be simply extended through the accretions to the center of the river, without any change of direction or deflection of the line, it is conceded the land in dispute belongs to the plaintiff, but not otherwise. The position is also taken in appellee's brief, that "a line drawn at right angles to the thread of the stream, not the current of the water, from the river end of the dividing line between lots 233 and 232, on the upland, shows appellant's fence to be on appellee's land," or in other words, that the land belongs to the plaintiff. While the testimony does not distinguish as clearly between the channel or current and the middle thread of the river as it might, yet when the whole of the evidence is considered we do not think it warrants the claim of appellee. Treating this as a material question in the case, appellee must be held responsible for the consequences if it has been left in doubt.

What is the proper rule for the division of accretions in cases of this kind, is a subject that has been so often and ably discussed by the courts of last resort in this country, that we do not deem it necessary, if indeed proper, to do any thing more than to merely state the proper rule, as we understand it, and refer to some of the cases in which a full discussion of it will be found.

The rule as stated in appellant's third proposition, which the court refused to hold as law, we regard as substantially correct, that is to say, "measure the entire river front of survey 759 as it existed in 1860, when the third subdivision of Cahokia commons was first laid out," and note the aggregate number of feet frontage, as well as that of each parcel or lot; then measure a line drawn as near as may be with the middle thread of so much of the stream as lies opposite the shore line so measured. Having done this, divide the thread line thus measured into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures feet on the shore line; then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines. This rule seems to be reasonable, and is well

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supported by authority. *Gray v. Deluce*, 5 Cush. 9; *Thornton v. Grant*, 10 R. I. 477; s. c., 14 Am. Rep. 701; *Aborn v. Smith*, 12 R. I. 370; *Miller v. Hepburn*, 8 Bush, 326; *Knight v. Wilder*, 2 Cush. 199; s. c., 48 Am. Dec. 660. The rule adopted by the court below is practically without authority to support it. An examination of the cases will show that in the division of accretions the side lines between adjoining riparian owners are, as a general proposition, wholly disregarded. Thus, in *Manchester v. Point Street Iron Works*, 13 R. I. 355, it is said: "One common principle which pervades all modes of division is, that no regard is to be paid to the direction of the side lines between contiguous proprietors." See also in this connection, note to *Hagan v. Campbell*, 38 Am. Dec. 280. In *Gould on Waters*, § 162, it is said: "In all cases where practicable, every proprietor is entitled to a frontage of the same width on the new shore as on the old shore, and at low-water mark as well as high-water mark, without regard to the side lines of the upland, unless referred to as guides in particular grants, or established as boundaries by agreement or conduct of the co-terminous proprietors, or the acts of public authorities."

There may be special circumstances in some cases requiring a modification of the rule here laid down; but as between the present parties, we see nothing in the record before us to take the case out of the operation of the rule. Indeed, there may be special circumstances, as between some of the parties owning portions of this river front, that would make it inequitable as between themselves, to enforce the rule as here stated. But that is no reason, assuming such cases to exist, as is intimated, why the general rule should not be applied as between the present parties.

The judgment of the Circuit Court will, for the reasons indicated, be reversed and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

Rebhan v. Mueller.

REBHAN V. MUELLER.

(114 IN. 262.)

Will — time within which it may be proved.

In the absence of statutory regulation, a will may be admitted to probate at any time after the testator's death, but acts done and rights acquired under a previous grant of administration will be protected.

THE opinion states the case.

W. C. Kueffner and J. M. Dill, for appellant.

R. A. Halbert, for appellee.

CRAIG, J. Christian Mueller died March 7, 1870. On June 11, 1883 (more than thirteen years afterward), Solomon Mueller, a son of the deceased, produced in the Probate Court of St. Clair county a paper purporting to be the last will of the deceased, which was dated March 19, 1855, and asked that it might be admitted to probate. The witnesses to the will appeared, and after hearing their evidence the court revoked letters of administration which had been previously issued, and admitted the will to probate. No question was made in regard to the genuineness of the will or the capacity of the testator to make a will, but the point presented by the record "relates to the time within which a will must be offered for probate after the death of the testator."

Section 12, chapter 148 of the Revised Statutes of 1874, entitled "Wills," requires any person who may have in his possession the last will or testament of another, immediately upon the death of the testator, to deliver such will to the County Court of the county. This section of the statute imposes a fine for withholding a will from the County Court, and also severe punishment for willfully secreting a will. But a failure of any person who had the custody of the will to observe this requirement of the statute could not affect the rights of any person claiming under a will, nor the jurisdiction of the Probate Court to admit the will to probate upon proper proof, whenever, within a reasonable time, a will might be brought into court. Upon the death of a resident of this State, if no will be produced and probated, letters of administration may be

granted upon the estate of the deceased. But section 28, chapter 3 of the Revised Statutes of 1874, declares: "If at any time after letters of administration have been granted, a will of the deceased shall be produced and probate thereof granted according to law, such letters of administration shall be revoked." From the reading of this section of the statute the legislature did not seem to fix upon a definite time within which a will should be presented in court and admitted to probate, and we find no section of our statute which may be regarded as a limitation law barring the probate of a will after a specified time. The legislature has seen proper to limit the time within which different causes of action may be brought in this State, but as to the probate of a will no time has been designated within which it must be done. In England no definite time is fixed within which a will should be proved. In 1 Jarm. Wills, 218, the author in speaking on this subject, says: "The time within which, after the testator's death, the will is to be proved, is said, in England, to be somewhat uncertain, and left to the discretion of the judge, according to the distance of the place, the weight of the will, the quality of the executors, the absence of the witnesses, the importunity of the creditors and legatees, and other circumstances incident thereto." In *Massachusetts*, in *Shumway v. Holbrook*, 1 Pick. 116; s. c., 11 Am. Dec. 153, it was held that a will may be proved more than twenty years after the death of the testator, in order to establish a title to real estate. In some of the States the time has been regulated by statute, but in the absence of a statute regulating the subject we are not aware of any precedent which would authorize a court in holding that a will could not be admitted to probate unless presented to the Probate Court within a specified time.

Within what time an action may be brought to recover a debt, or to recover the possession of lands, or within what time an action for tort may be brought, or indeed any action, is purely a matter to be determined by an act of the legislature. So also, if there is any thing in the policy of the State which would require the will of a deceased person to be proved and admitted to probate within seven, ten, or any other given number of years, it is a matter to be regulated by the legislature and not by judicial determination. It is no doubt desirable, and perhaps for the best interests of an estate, where a person dies testate, that the will should be presented to the court and probated at once; but if a will is not produced, and let-

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ters of administration issue, acts done and rights acquired under such administration will be entitled to protection, so that no serious consequences can follow from the delay in probating a will.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

LYMAN V. GEDNEY.

(114 Ill. 388.)

Deed — description — monument — "block."

In an agreement for a deed of land describing it by numbers and dimensions, and concluding "known as the Cook and Clover block," the latter words control.

ACTION for reformation and specific performance. The opinion states the point.

Snow & Stead and E. C. Swift, for appellant.

C. B. Chapman and Mayo & Widmer, for appellee.

SCHOLFIELD, J. This was a bill for the rectification and specific performance of an agreement to exchange and convey certain real estate in the city of Ottawa. The court below decreed in conformity with the prayer of the bill, and the case is brought here by the appeal of the defendant.

After some preliminary discussion, which was protracted, the parties signed an agreement, written in pencil, as follows:

"H. E. Gedney agrees to convey to R. D. Lyman, by Sept. 1, the N. $\frac{1}{4}$ of the N. $\frac{1}{4}$ of lot No. 2, in block 11, by good and sufficient warranty deed, subject to mortgage of \$4,000, to Geo. R. and A. Keep, with interest accruing thereon from July 11, 1883, and a piece of ground 10 by 40 in rear thereof, on following terms (namely, known as the Cook & Clover block): Lyman is to pay Gedney \$8,500, in cash or mortgages, by Sept. 1, 1883; also, to convey by good title the two lots of ground known as the Geo. H. Norris or Hickling property, being a two-story brick house, standing, etc., on lots 5 and 6, block 2, Walker's add. to Ottawa. Gedney is to,

have the use of all rents of property on the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of lot 11, in block 11, till Nov. 1, 1883; also, to have use of Norris or Hickling property by Sept. 1, 1883. Gedney is to transfer to R. D. Lyman on Nov. 1, 1883, all his insurance policies on the three-story brick building conveyed to him, amounting to not less than \$10,000, by renewing for one year any policies expiring before Nov. 1, 1883; and Lyman is to assign to Gedney his insurance policy amounting to on the Norris or Hickling property. Gedney and Lyman bind themselves in the sum of \$1,000 as liquidated damages, to fulfill above agreement.

“Witness our hands this 24th day of Aug., 1883.

H. E. GEDNEY,
R. D. LYMAN.”

At the time of signing this, the parties mutually agreed that Duncan, McDougal, an attorney at law, should draw up a more formal instrument, written in ink, evidencing the agreement, which they would sign on the next day. Accordingly, he drew up the following, which was subsequently signed by the parties:

“This agreement, made this 24th day of August, A. D. 1883, by and between Henry E. Gedney, of the city of Ottawa, in the county of La Salle, and State of Illinois, party of the first part, and R. D. Lyman, of the same place, party of the second part:

“Witnesseth, that if the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey by good and sufficient warranty deed, subject to a certain mortgage in favor of George R. and A. Keep, given to secure the sum of \$4,000, together with interest accruing thereon from July 11, 1883, which the party of the second part assumes and agrees to pay, the lots, pieces or parcels of land situated in the county of La Salle, and State of Illinois, known and described as follows, to-wit: the north half of the north half, of lot two (2), in block eleven (11), in the original town (now city) of Ottawa; also, a strip of ground ten feet wide, extending along the east end of said strip of ground, being the same piece of ground described in the deed to the party of the first part. The party of the first part reserves the possession and accruing rents of said property until the first day of November, 1883, notwithstanding said conveyance may be sooner made without such reser-

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vations. The party of the first part further agrees to transfer to the party of the second part all insurance policies upon said property to the amount of \$10,000, at the time of the execution and delivery of said deed, and at his own expense renew, for the period of one year, any of said policies that may expire up to November 1, 1883. The party of the first part further agrees that his wife will join him in said conveyance, to the extent of relinquishing her dower right therein.

"The party of the second part covenants and agrees to pay the party of the first part the sum of \$8,500 in cash, or good notes and mortgages that are acceptable to the party of the first part, and convey to the party of the first part, by good and sufficient warranty deed, free and clear of all incumbrances, the following described lots, pieces or parcels of land situated in the county of La Salle, and State of Illinois, known and described as follows, to-wit: Lots 5 and 6, in block 2, Walker's addition to the town (now city) of Ottawa, together with all and singular the appurtenances and privileges thereunto belonging or in any wise appertaining. The party of the second part agrees to assign and transfer, at the time of the delivery and execution of said deed, all the insurance policies then upon the property above described, known as the 'Norris or Hickling property.'

"It is mutually agreed by the parties hereto, that the several conveyances and payments above referred to shall be made on or before the first day of September next. The parties hereto further mutually bind themselves, respectively, in the penal sum of \$1,000, as liquidated damages, which they respectively agree to pay each to the other, together with all other damages that may be sustained by either upon the failure of the other to comply with each and every one of the covenants herein contained.

"Witness our hands and seals the day and year first above written.

H. E. GEDNEY,

R. D. LYMAN."

Lyman refused to perform his part of this agreement. A mistake occurred in the description of the property to be conveyed by Godney. The decree below corrects that mistake, and then requires this contract to be specifically performed.

[Omitting other points.]

The point is made that the statute of frauds being pleaded, it is not competent to decree a rectification and specific performance

of the contract, on parol evidence. The mistake in the description of the property in the written instrument occurred in this way: Lot 2, in block 11, is one hundred and fifty feet long, north and south, by eighty feet wide, east and west. The Cook & Glover block, which appellee undertakes to convey to appellant, occupies the north forty feet of the lot, which appellee by mistake assumed was one-half of one-half, or one-fourth of it, and hence in the instrument the block was by mistake described as the north half of the north half of the lot, which of course is but thirty-seven and one-half feet, and leaves two and one-half feet occupied by the block unconveyed. The balance of the description, in the instrument written in ink, is after the words, "north half of the north half of lot 2," etc., "also a strip of ground ten feet wide, extending along the east end of said strip of ground, being the same piece of ground described in the deed to the party of the first part." The deed to the party of the first part is by Cook & Glover, and conveys "a strip of land ten (10) feet in width, east and west, and forty (40) in length, north and south, in the north-west corner of lot number one (1), in block number eleven (11), in the original town (now city) of Ottawa, Illinois, the premises above described being situated immediately in the rear of said Henry Gedney's block of brick stores on lot numbered 2, in said block numbered 11, situated in the county of La Salle, in the State of Illinois." This description is free of objection, and inasmuch as the instrument refers to it, and in effect adopts it, no rectification of that much of the instrument is needed. *Smith v. Crawford*, 81 Ill. 299.

For the purpose of rectification, the instrument written in pencil is competent evidence. It describes the property which appellant undertakes to convey, thus: "N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of lot No. 2, in block 11, * * * and a piece of ground 10 by 40 in rear thereof, on the following terms (namely, known as the Cook & Glover block)." In effect, the Cook & Glover block is conveyed, and a strip of ground ten by forty in the rear thereof. The words, "Cook & Glover block," are the controlling descriptive words. The block is a fixed and permanent monument, and under the well-settled rules of construction applicable to conveyances, any words of description repugnant thereto, or inconsistent therewith, must be rejected. Without affirming or denying what may be the law in a case where rectification and specific performance rest entirely on parol evidence, there can be no question but that latent ambi-

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guities may be explained by parol evidence, and that such evidence may also be resorted to for the purpose of identifying the premises and applying the calls of the deed, in suits for rectification and specific performance, and in other actions and proceedings affecting title. *Cossit v. Hobbs*, 56 Ill. 231; *McLennan v. Johnson*, 60 Ill. 306. By applying parol evidence to this description, it is proved that the north half of the north half of lot 2 is only thirty-seven and one-half feet, and that Cook & Glover's block occupies the north forty-feet of the lot, and so then we must reject the description "north half of the north half" as repugnant to the other description or call in the deed, namely, "Cook & Glover's block," and following that, hold that the contract is to convey the north forty feet of the lot.

Decree affirmed.

RIDGEWAY V. POTTER.

(114 Ill. 487.)

Surety — right to exact indemnity or further security from principal.

One of several sureties of a trustee on his bond to secure the beneficiaries cannot maintain a bill to compel him to substitute solvent sureties for those who have become insolvent, or give counter security, on pain of removal.

BILL to compel a trustee to substitute sureties. The opinion states the case. The bill was dismissed below.

A. D. Duff and Green & Gilbert, for appellant.

E. D. Youngblood and James M. Gregg, for appellee.

SHELDON, J. The bill in equity in this case, filed by Thomas S. Ridgeway, complainant, to the September term, 1882, of the Galatin Circuit Court, sets out that by a certain instrument in writing, bearing date November 2, 1871, signed by the proper parties, one-half of the estate of one Orval Pool, then lately deceased, was created a trust fund, the interest and other increase of which were for the benefit of certain persons therein named, during their natural lives, and at their death the remainder was to vest absolutely in their respective heirs; that this instrument provided for the appointment of a trustee to receive this trust fund and

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manage the same, and execute and carry out the provisions of said trust, and that the trustee should enter into a good and sufficient bond, to be approved by the judge of the Circuit Court of Gallatin county, for the faithful performance of his duty as such trustee; that on December 26, 1871, George H. Potter, the defendant, was, as provided in said instrument, appointed such trustee by the judge of the Circuit Court of Gallatin county, and on May 15, 1872, the trustee made his bond assueh, in the penal sum of \$400,000, with H. O. Docker, David Reid, Robert Reid, J. McKee Peeples, J. McKee Peeples, Jr., and Thomas S. Ridgeway, complainant, sureties, all of whom were then solvent, which bond was approved by such judge; that defendant, since the execution of said bond, has received as such trustee over \$100,000, but has never rendered any account thereof to any court or person, nor made any report showing the amount so received or the disposition and management thereof by him; that on December 22, 1879, J. McKee Peeples, Sr., departed this life testate; that his estate is nearly all distributed among his devisees and legatees, and is in process of final settlement and closing up; that all of the surviving sureties on the bond, except complainant, are now wholly insolvent, and that the trustee himself is in limited circumstances as to pecuniary means. The bill asks that the trustee be required under oath to answer and render a full and complete report and account of his actings and doings as such trustee, and if it shall appear that there has been improper management of the trust fund, that the trustee be removed from his trusteeship, and another person be appointed in his stead; and also that if the trustee retains his position, he be required to give other and additional securities upon said bond, or an additional bond, and on failure to do so, that the trustee be removed and another one appointed in his place with a prayer for general relief. Defendant filed his answer under oath, as required by the bill, making a full report as trustee, an exhibit and part of the answer. No exception was taken to the answer. The cause was referred to the master to take proofs, who only took two depositions as to the insolvency of the sureties. Upon hearing on the foregoing alone, the court dismissed the bill. On appeal to the Appellate Court for the fourth district, the decree was affirmed, and the complainant appealed to this court.

It is insisted that it was error in the Circuit Court not to pass upon the report of the trustee, and approve or disapprove it; but

to what end and for what use should the court have done so? The beneficiaries of the trust were not before the court, and they would not be bound by any action of the court on the report. The parties to this suit, the surety of the trustee and the trustee were interested together, on one side of the account, that it should be in favor of the trustee, and an *ex parte* proceeding between them, in the absence of the parties interested on the other side of the account, to take and state the trustee's account, would seem to be idle. Were the persons beneficially interested in the trust property before the court, so that they would be bound by the result of the accounting, and it be conclusive against them and in favor of the surety in any action by the former upon the trustee's bond, then the propriety of this complainant, who is but a mere surety for the trustee, asking for a settlement of the account before the court, might with more reason be urged.

As respects the other relief asked, the giving of additional security, abundant authority is cited to the effect that courts of equity always exercise control over trustees in the administration of their trusts; that if trust funds become endangered by the financial failure of the trustee, a court of equity will protect them, and will always see that trust estates are not exposed to danger or loss; and it is said that by the express terms of the instrument creating this trust fund, the trustee is required to execute a good and sufficient bond, which means that during the time he acts as trustee he shall keep and maintain a good and sufficient bond. All this is very well, and would be quite apposite were the beneficiaries of this trust fund the parties here complaining; but the persons for whose benefit this bond was given make no complaint that it is not good and sufficient, but for aught that appears, are content therewith as it is. The bond was not given for the benefit of the complainant, and he has no cause of complaint that it is not good and sufficient for the protection of the trust estate. He has no interest in the property the bond was given to protect. There is no pretense from any allegation in the bill, that the bond is not now amply good and sufficient. The complainant is making demand for further security in his own interest, in order that he may have others to share with him his responsibility on the bond, or that he may get relieved from further liability. He is entitled to complain only in respect of some duty which is owing to himself, and not for any failure of duty toward others, the beneficiaries of this trust fund.

The contract which arose between the trustee and complainant, from the relation of principal and surety, was that the former would refund to the latter whatever the surety had to pay for the principal; but the principal came under no such duty that he would keep the co-sureties on the bond in equal solvency as they were at the time they executed the bond, or that he would keep any co-sureties on the bond to share with complainant his suretyship. Courts of equity, in relief of sureties under apprehension of loss or injury, have gone to the extent to allow the surety, after the debt has become due, to file a bill to compel the debtor to discharge the debt for which the surety is responsible. And it has been said that a surety, when the debt has become due, may come into equity and compel the creditor to sue for and collect the debt from the principal. 1 Story Eq. Jur., § 327. But we have been referred to no precedent for the maintenance by a surety of a bill of like character with the present, and we know of no principle of equity under which such a bill is to be sustained. Our statutes have to a certain extent provided for the release of sureties upon bonds which they have executed, as when a surety upon the official bond of a public officer desires to be released from such bond, after the taking of certain steps on the surety's part to that end, if the officer fails to give a new bond, his office is made vacant. Rev. Stat. 1874, p. 720, § 10. And so there is provision that any surety on the bond of any guardian, conservator of any idiot or insane person, or the trustee of any fund or property, appointed by any court, may by petition in court compel such guardian, conservator or trustee to appear and settle his accounts and file a new bond. Laws 1877, p. 142. But it has been decided that this statute did not embrace the case of this particular bond. *Potter v. Peebles*, 93 Ill. 430.

We can see that it is a hardship for the complainant to stand as the sole solvent surety on such a bond, where there is no express requirement for any accounting and settlement of accounts, subject to an unknown and indefinite liability, and that it would be very desirable on his part to have afforded to him the relief provided by this latter statute, and as asked for by his present bill; but we do not see how it can be done, aside from the aid of any statutory provision in such behalf.

The decree of the Appellate Court must be affirmed.

Decree affirmed.

MULKEY, C. J., took no part.

People v. Knickerbocker.

PEOPLE v. KNICKERBOCKER.

(114 Ill. 539.)

Mandamus — to compel probate of will.

Mandamus will not issue to a Probate judge to compel him to admit to probate a will pending an appeal from his refusal to admit to probate another will of the same testator.

MANDAMUS to compel probate of a will. The opinion states the case.

Swett, Haskell & Grosscup, Trumbull, Washburn & Robbins, Dexter, Herrick & Allen, for petitioner.

W. C. Goudy and John P. Altgeld, for respondent.

SHELDON, J. Stress is laid upon the language of the act in regard to wills, in section 2, chapter 148, of the Revised Statutes of 1874, that when any will shall be exhibited for probate, it shall be the duty of the court to receive probate of the same without delay, as being peremptory on the court to proceed at once in receiving probate of a will which is offered for that purpose. No doubt it is the policy of the act that there should be made settlement of the estates of deceased persons at as early a day as practicable. But the language referred to is not to be taken in the sense so literal that the court, on presentation of a will for probate, must immediately proceed in the probate thereof. The meaning is no more than that the court shall proceed without unreasonable delay. The courts are vested with more or less discretion as to the order of business before them, and as to advancing or postponing causes. This is recognized in the provision of our Practice Act for the keeping of a docket of all the causes pending, and that the causes shall be tried or otherwise disposed in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct. And it must be the rule that ordinarily there will not be interference by *mandamus* to direct when another court shall proceed with the hearing of any particular cause.

In the present case there were two writings, of different dates, before the Probate Court at the same time, each purporting to be

the last will and testament of Wilbur F. Storey, the one last in date revoking all former wills. Which one should the court proceed to receive probate of first? Suppose the relatrix had insisted that the one first in date, that of August 16, 1879, should be first acted upon. There would be a case for the exercise of discretion. And proceeding first to receive probate of the last writing, and postponing until afterward the probating of the first writing, must be admitted would be a most fit exercise of discretion. Had the refusal of probate of the last will remained the final order of the Probate Court, then the probating of the first would have been proceeded with without hindrance. But such refusal of probate did not remain a final order, but it was appealed from, and the matter of probating the last will was still pending and undetermined. But notwithstanding that, the Probate Court might have the power to go on now and receive probate of the first will. Yet is there not a fair question as to the propriety of so doing? It may be thought that the same reason of fitness, which dictated the course of first receiving probate of the last will and postponing thereto the probate of the first will, still operates to continue such postponement until there be had a determination of the controversy pending whether the paper last in date be a will or not. If that shall be found to be the will of the decedent, then the first will is annulled, and the probating thereof would be nugatory. The motion to postpone the hearing as to the first will, under the circumstances, called for the exercise of the court's discretion. It was exercised in making a postponement until the further order of the court, for the reason of the pending appeal from the order refusing probate of the last will. This is such an exercise of a court's discretion as we do not feel called upon to interfere with. There does not appear to have been any abuse of discretion. This court has repeatedly held, that where the exercise of a discretion is involved, a writ of *mandamus* will not be allowed. *People v. Pearson*, 2 Scam. 204; s. c., 33 Am. Dec. 445; *Village of Glencoe v. People*, 78 Ill. 383; *County of St. Clair v. People*, 85 Ill. 396; *People v. Williams*, 55 Ill. 178. In High on Ex. Leg. Rem., § 260, it is laid down: "The existence of other litigation in another forum, affecting the matter which is the foundation of the proceedings in *mandamus*, may sometimes operate as a bar to relief by this extraordinary writ. And it has been refused where it was sought to compel the granting of administration, it being shown

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that a contest was already pending as to a pretended will of the deceased." And see *People v. Superior Court, etc.*, 19 Wend. 701; *Stewart v. Eddy*, 7 Mod. 143; *Sir Richard Raines'* case, 5 Mod. 374; *Lovegrove v. Bethell*, 1 Wm. Bl. 668; *Rex v. Hay*, 4 Burr. 2290; *Rex v. Bettsworth*, 2 Str. 1111.

On the part of the relatrix, reference is made to the statement of the law as made in 3 Redfield on Wills, 54: "Where the Probate Court declines to proceed in the probate of a will, or to give the executor letters testamentary, having no justifiable excuse therefor, the Superior Court, by *mandamus*, will compel the Probate Court to proceed in the matter." There is here no declining absolutely to proceed, but, only at the present time, for what the court deems the justifiable reason, that there is a proceeding pending for the establishment of a later will, amounting but to a continuance on motion made therefor. The authority cited should not control in such a case.

A point is made by the relatrix that the probate of a will is a ministerial act, and reference is made to *Ferguson v. Hunter*, 2 Gilm. 657, and *Ayers v. Clinefaller*, 20 Ill. 473, as so holding. These decisions were under former statutes, and previous to 1849. The statute of 1819 authorized probate of a will to be made before the county commissioners. In 1837 a Probate Court was created, presided over by a justice of the peace, and the statute declared the probating of a will to be a ministerial act. The present statute has no such provision. A change was made in 1849, establishing the County Court a court of record to be held by one judge, the court being vested with all the powers and jurisdiction of the Probate Court as then established, the act declaring that granting letters testamentary or of administration, determining who are entitled to said letters, should be considered as general judicial powers under the act. The Constitution of 1870 provided for a County Court to be a court of record to be held by one judge, and conferred upon it original jurisdiction in all matters of probate. The Constitution also provided for the establishment of a Probate Court in certain counties, and under this section the Probate Court of Cook county has been created with an original jurisdiction of all probate matters. In *Duncan v. Duncan*, 23 Ill. 364; s. c., 76 Am. Dec. 699, it was held that parties in interest might contest the validity of a will before the Probate Court as well as by bill in chancery, and should be allowed to examine the attesting witnesses

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as well as others. We have no doubt that the court here, in acting upon the motion for postponement, should be regarded as in the exercise of judicial functions, and that the same doctrine is to be applied as in a case of such kind.

The similarity of the provisions of the two wills, and the fact that the same person is appointed executrix in each, is remarked upon as removing the objection to the immediate probate of the earlier will. This would diminish the inconveniences which would result from the probating of two wills of different dates, but would not entirely obviate the same.

It is insisted that there is a want of good faith on the part of Mrs. Farrand in the prosecution of her appeal from the order refusing probate of the later will, that it is for her interest that the order should stand and the will not be established, as in the case of intestacy she would come into immediate possession of one-third of the estate. On the hearing before the Probate Court, on the motion for postponement, such want of good faith was averred on the one side and denied on the other, and in view thereof the court made its decision. The motive for taking the appeal hardly seems to be a proper subject of inquiry. There was the right to take the appeal, and it was taken, which left the question of the validity of the later will undisposed of and still pending for decision. That there was ground for the taking of an appeal, there is the evidence furnished by the relatrix's action in herself taking an appeal. We can see that it appears to be for the interest of Mrs. Farrand that there should be a case of intestacy, that there should be no will whatever established; yet as between the two wills it is for her interest that the one later in date should be established, rather than the earlier one. She has, at any rate, exercised her right to take an appeal, and her motive in so doing seems hardly inquirable into to do away with the effect of the appeal in its bearing upon the decision of the Probate Court.

Upon consideration of the whole matter, there is not made to appear here the clear right to the writ of *mandamus* which must be shown in order to its allowance, and we are of opinion the demurrer to the answer should be overruled, and that there should be judgment in favor of the defendant, denying the writ.

Mandamus denied.

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JOHNSON V. JOHNSON.

(114 Ill. 611.)

Marriage — presumption of validity — presumption of continuance of life.

Where a woman, deserted by her husband, married another, more than six but less than seven years after the first had been last heard from, the presumption in favor of the validity of the second marriage outweighs the presumption of the continuance of the first husband's life.

DIVORCE. The opinion states the case. The plaintiff had judgment below.

R. W. Mills, for plaintiff in error.

Ketcham & Gridley, for defendant in error.

SHORE, J. This was a bill for divorce, filed by Sarah O. Johnson, defendant in error, against Michael E. Johnson, plaintiff in error, in the Cass Circuit Court, where a decree of divorce was rendered. The cause was taken by writ of error by defendant below to the Appellate Court for the Third District. The decree of the lower court was there affirmed, and the present writ of error is prosecuted to this court from that order of affirmance.

[Minor questions omitted.]

That the evidence is sufficient to warrant the verdict and decree in favor of complainant is not denied by counsel for defendant, if her marriage with the defendant was a valid marriage. The serious contention is, that at the time of the marriage of complainant with defendant she had a former husband living, and therefore her marriage with defendant was void — that whatever her rights under a bill properly framed for that purpose might be, no relief could be granted under this bill. This position of counsel would be undeniable if the evidence warrants the assumption that complainant had a former husband, who was living at the second marriage, and from whom she had never been divorced. The only evidence contained in the record tending to establish that at the time of her marriage with defendant the complainant had a husband living, is that given by complainant on cross-examination by defendant's counsel. This evidence was, in substance, that complainant was

married to one Albert Thurber in Menard county, Illinois, on the 26th day of July, 1866; that they lived together three months; that said Thurber then deserted her and went away; that about a year after the separation, and some time in 1867, she received a letter from him, and that from that time to the trial in August, 1884, she had not seen him or heard from him; that she had heard rumors at one time that he was dead, and another that he was alive, and another that he was married again. No other witness testified in regard to the matter under consideration, or to any circumstance having any bearing thereon, and no other evidence was offered.

The marriage of complainant with the defendant is shown to have been solemnized in the month of February, 1874—over six, but less than seven years after the last knowledge of the former husband—and it is contended that as the law presumes the continuance of life where the time of the absence has not extended to seven years, this presumption must control, and therefore the marriage in issue is void. It has been repeatedly held that mere rumor that the absent party is dead or living cannot be received in evidence, either to aid or rebut the presumption of life. The case of the defendant, as made by his amendment to his answer, therefore rests solely upon the supposed presumption of the living of the former husband at the time of the last marriage. The general presumption is that life continues for seven years after the party is last heard from, and after the lapse of that time death is presumed; but the presumption is not conclusive—is *presumptio juris* only—and may be rebutted by proof of facts and circumstances inconsistent with and sufficient to overcome it. Under the rule, seven years must elapse before the presumption of death arises. When the seven years have elapsed, the fact of death is presumed; but there is no presumption that the life continued through the entire period, or that it was or was not extinguished at any particular time within it—that is, the law raises no presumption as to the time when, within the seven years, the death in fact occurred. 1 Greenl. Ev., § 41; Bish. Marr. and Div., §§ 452–456. It is also clear that the jury may find the fact of death from the lapse of a much shorter period than seven years, when the circumstances of the particular case raise the presumption of death. 1 Greenl. Ev., *supra*.

But if the law raises the presumption that the former husband

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was alive at the date of the last marriage, from the fact that seven years had not then elapsed since the last knowledge of him, it also, in the absence of proof to the contrary, presumes that the parties in contracting such marriage, and in subsequently cohabiting, were innocent of immorality or crime, and that there was no legal impediment to its consummation. When a marriage is shown, in fact, the law raises a strong presumption in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid. Bish. Marr. and Div., §§ 457, 458. Presumptions of this class are not conclusive, but are sufficient, in general, to shift the burden of proof. 1 Greenl. Ev., §§ 33-35. These presumptions of innocence, and of the validity of the marriage, conflict with the presumption of life, and if neither presumption is aided by proof of facts or circumstances co-operating with it, the presumption of the validity of the marriage has generally been held to be the stronger, and to prevail over the presumption of the continuance of the particular life — and this is so held, although the time elapsing between the last knowledge of the former husband and the second marriage is much less than seven years.

Rex v. Twynning, 2 B. & Al. 386, was a case where these conflicting presumptions came under consideration. The wife of a soldier, who went abroad, married again in a little over a year, and the question was as to the legitimacy of the children of this second marriage. The court said: "The law presumes the continuance of life for seven years, but it also presumes against the commission of crime. It is contended that the death of the husband ought to have been proved, but the answer is that the presumption of law is that he was not alive when the consequence of his being so is that another person has committed a crime."

In *Yates v. Houston*, 3 Tex. 440, four years only had elapsed after the disappearance of the wife before the husband and another woman appeared as husband and wife, under circumstances raising the presumption of marriage, and in considering the subject of the conflicting presumptions the court held that "the rational presumption after this lapse of time is that the former wife is dead. The ordinary presumption of the continuance of human life should not, under the facts in this case, outweigh the presumption in favor of the innocence of their cohabitation, and that there was no legal impediment to their contracting the matrimonial relation."

In *Dixon v. People*, 18 Mich. 84, the prosecution, desiring to use

a witness who claimed to be the wife of the defendant, produced evidence of her marriage to one Phillips in 1859. Thereupon she was put on the stand, and admitted her marriage with Phillips, and stated that she last heard from him in April, 1860, and supposing he was dead, married the defendant in 1865. The court below permitted her to testify, against the objection of the defendant. The Supreme Court of the State, in reviewing the case, said: "The presumption of innocence — that she would not commit the crime of bigamy by marrying the defendant while Phillips was alive — rendered it obligatory on the court, in the absence of testimony to the contrary, conclusively to presume the death of Phillips and the validity of her marriage with defendant."

In *Senser v. Bower*, 1 Penn. St. 450, the court, in determining the validity of a second marriage, say: "But there is said to be the same evidence of a precedent marriage of the mother with another man, who was alive at her second marriage, and hence a supposed dilemma; but the proof being equal, the presumption is in favor of innocence. And so far as this carried in the case of conflicting presumptions, that the one in favor of innocence shall prevail."

In *Hull v. Rawls*, 27 Miss. 471, the widow of Rawls petitioned for dower, which was resisted upon the ground that her marriage with Rawls was void, for the reason that he had a wife living at the date of his marriage with the petitioner. The proof showed that petitioner and Rawls were married December 6, 1848, and that in 1844 Rawls was living with another woman whom he recognized as his wife. The court said: "The fact that the deceased (Rawls) was living in 1844 with a woman believed to be his wife, is no evidence that she was living on the 6th of December, 1848. The marriage having been solemnized according to the forms of law, every presumption must be indulged in favor of its validity."

The case of *Chapman v. Cooper*, 5 Rich. 452, was where five or six years only had intervened between the time the former husband was last heard from and the second marriage of the wife, and the court held that under the facts of that case (the case having been brought many years afterward), the presumption of innocence ought to prevail.

The only case of this character determined in this State that we are aware of came before the Appellate Court for the second district for consideration. *Harris v. Harris*, 8 Bradw. 57. That was a bill for divorce, filed by the husband against the wife, seeking to

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declare the marriage void because the wife had a former husband living at the time of the marriage of these parties. That court, in an able opinion by PILLSBURY, J., after reviewing many of the authorities here cited, said: "In cases like this at bar, where nine years had elapsed (at the trial) from the time the first husband was last heard from or seen by any witness testifying in the cause, the law will not presume the continuance of life to the time of the second marriage, but will require the complainant to introduce direct evidence to prove that the former husband was alive at the date of the second marriage. There being no sufficient evidence of this character to sustain the verdict, and as the instructions permitted the jury to find Lowry (the former husband) was living at the time of the marriage between these parties, from the presumption of life alone, thereby changing the burden of proof from complainant to the defendant, the case will be reversed."

Further citation of authorities will be unnecessary, as those cited sufficiently show the trend of judicial determination on this subject. It will be seen that many of the cases, like *Rex v. Twining*, *supra*, seem to lay down the proposition as a strict rule of law, and hold that the presumption of innocence will prevail whenever the presumption of the continuance of life would impute crime. This appears to be the chief ground for criticism of the case last named, in *Rex v. Harborne*, 2 A. & EL. 540. We think however that the weight of authority is that it is a question of fact to be determined upon the circumstances of the particular case, that there is no rigid presumption to be inflexibly followed, aside from the considerations of such circumstances. In *Rex v. Harborne*, *supra*, the circumstances being that the wife had been seen within twenty-five days of the second marriage of the husband, it was held that the presumption of the continuance of life should prevail, while in *Greenborough v. Underhill*, 12 Vt. 604 (afterward questioned in *Northfield v. Plymouth*, 20 Vt. 583), it was held that after an absence of two years not heard from, the presumption of innocence would prevail over the presumption of life. So also the age, condition of health, habits of the absent party, and many other circumstances, may be brought in to aid or rebut the presumption of the continuance of life. Therefore no absolute rule can be laid down to determine when or in what particular case the presumption of life should prevail over the presumption of innocence, or the reverse; but the question, like any other question of

fact, must be determined upon consideration of the attending facts and circumstances. It may however be safely said, that where there are no circumstances to aid the presumption of the continuance of life, the presumption of innocence and of the validity of the second marriage should in general prevail.

It is always material to consider, in cases like the one at bar, not only the time that intervened between the last knowledge of the former husband or wife and the second marriage, but also between such last knowledge and the trial of the cause; for if the full period in which death is presumed has elapsed at the time of the litigation, and there is no presumption as to when, within the seven years, the death in fact occurred, it may as well be held to have taken place before as after the second marriage, and there will in that event be "no great need of help from the presumption of innocence to sustain the second marriage." Bish. Marr. and Div., § 456; *Kelly v. Drew*, 12 Allen, 107. In the case last cited, a woman had married four years after her former husband was last heard from. Sixteen years afterward the validity of her second marriage was called in question. The court held it valid, and said: "No evidence was offered that the first husband had been heard from for twenty years, or that he had not died, or been divorced from her before her second marriage. Under the circumstances the presumption of the wife's innocence in marrying again might well overcome any presumption that a man, not heard from for four years before the marriage, or for sixteen years afterward, was alive, and her lawful husband when she married the second time." At the trial of this cause over sixteen years had elapsed since the last knowledge of the former husband, and we see no reason why these principles do not apply. We think the complainant might safely rely upon the presumption of the validity of her marriage. The law did not impose on her, under the circumstances of this case, the duty of preserving the evidence of the dissolution of her former marriage, and producing it on the trial, but the burden was on the defendant to prove such facts and circumstances as would establish the invalidity of his marriage with complainant.

Finding no error in the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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ACCRETION.

See WATER AND WATER-COURSES, 936.

AFFRAY.

See CRIMINAL LAW, 653.

AGENCY.

1. Sub-agent's neglect — agent's liability.] An agent is liable to his principal for the neglect of a sub-agent employed by the agent with the principal's knowledge but upon the agent's account. *Barnard v. Coffin* (141 Mass. 37), 448.
2. To sell — implied power to collect.] A travelling agent to sell goods, who has not the possession of the goods, may still receive payment so as to bind his principal, where such is the general and known usage, and it has been recognized by the principal. *Meyer v. Stone* (48 Ark. 210), 577.

AGISTER.

When considered owner.] An agister having by contract a special ownership and interest in sheep in his custody and in their increase, may maintain as "owner" an action for the negligent killing of them by a railroad company. *New York, Chicago and St. Louis R. Co. v. Auer* (106 Ind. 219), 784.

ARREST.

Liability of officer for mistake.] *See* CRIMINAL LAW, 463.

ASSAULT.

See CRIMINAL LAW, 896.

ASSIGNMENT FOR CREDITORS.

Subsequent composition.] Where a debtor had made a general assignment for the benefit of his creditors, and the creditors all afterward made a composition with him, *held*, that the assignment was vacated, and the creditors must share equally. *Guggenheimer v. Grosche* (23 S. C. 374), 30.

ATTACHMENT.

Foreign.] *See* CONFLICT OF LAWS, 123.

BAGGAGE.

See CARRIER, 263.

BANKS.

1. **Check — payment.]** When a bank pays a check to the holder, and cancels and delivers it up to the drawer, such payment cannot be rescinded by the drawer without consent of the person to whom payment was made. *Albers v. Commercial Bank* (85 Mo. 173), 855.
 2. **Savings — alteration of by-laws — effect on depositor — statute.]** A depositor in a savings bank agreed in writing to be bound by the by-laws of the bank. The deposit-book contained a copy of the by-laws, one of which gave the trustees power to alter or amend them. *Held*, that his right to recover money paid by the bank to a third person on a forged order was to be determined by the by-laws in force when the original contract was made, and not by a subsequent by-law of which he had no notice, whether the deposit was made before or after the passage of the late by-law; and the provision of the statute, that the deposits may be withdrawn at such time and in such manner as the by-laws direct, does not make the late by-law a part of the contract. *Kimins v. Boston Five Cents Savings Bank* (141 Mass. 38), 441.
 3. **National — buying drafts.]** A national bank may lawfully purchase a draft drawn in its favor by a seller of goods upon a buyer, with a bill of lading attached. *Union National Bank v. Rowan* (23 S. C. 389), 26.
- National.]** *See* TAXATION, 796.

BETTERMENTS.

See CONSTITUTIONAL LAW, 560.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

CARRIER.

1. **Baggage—working tools.]** A reasonable quantity of his tools is proper baggage for a mechanic working as a watchmaker and jeweller. *Kansas City, Fort Scott & Gulf Railroad Company v. Morrison* (84 Kans. 503), 263.
2. **Delay in transportation caused by strikers.]** A railroad is not responsible for delay in the transportation of merchandise caused by the violence and intimidation of former employees who had struck, and quit the employment. *Geisner v. Lake Shore and Michigan So. R. Co.* (102 N. Y. 563), 837.
3. **Delivery—notice to consignee.]** A carrier by water cannot be held for loss of goods delivered at the proper landing-place, although there is no warehouse there, and he gives no notice to the consignee, if such is the uniform usage, although neither shipper nor consignee knows the usage. *Turner v. Huff* (46 Ark. 222), 580.
4. **Negligence—free pass—limitation of liability.]** A boy sixteen years old was employed by the keeper of a restaurant at a station on the defend-

CARRIER—*Continued.*

ant's railroad to sell sandwiches and fruit on the trains, and had a free pass for the purpose over the whole road, conditioned that the company should not be liable for any personal injury caused by the negligence of its agents. The boy, while going for a private purpose over a part of the road to which he was not called by his business, and while in a baggage-car against the rule of the road, was killed by a collision caused by the gross negligence of the defendant's servants. The company had no interest in the restaurant, but gave the pass as a favor. *Held*, that the defendant was not liable. *Grinold v. New York and New England R. Co.* (58 Conn. 371), 115.

5. Railroad—negligence—platform higher than cars.] It is negligent in a railroad company to have a station platform higher than the car steps, and to require passengers to board the trains from a baggage car. *Turner v. Vicksburg, etc., R. Co.* (87 La. Ann. 648), 514.

6. —not furnishing seats for passengers.] If a railroad passenger rides on a train and refuses to surrender his ticket, or pay, for want of a seat, and is ejected, he may not recover for the ejection, but only for breach of contract to furnish a seat. *St. Louis, I. M. & S. Railway v. Leigh* (45 Ark. 368), 558.

CHARITY.

See WILL, 152.

CHECK.

See BANKS, 355.

CONFLICT OF LAWS.

1. Foreign attachment.] The defendant, a resident of Indiana and owning stock in a bank there, pledged the certificate, with a blank power to sell and transfer to a corporation in Connecticut, as collateral security for a loan of considerably less than the value of the stock. *Held*, that neither the stock nor the surplus interest in it could be reached by the attachment in Connecticut. *Winslow v. Fletcher* (58 Conn. 390), 122.

2. Usury.] A bond dated in North Carolina, and specifying no place of payment, although delivered in Virginia, is governed by the usury law of North Carolina. *Morris v. Hockaday* (94 N. C. 286), 607.

See MARRIAGE, 484.

CONSTITUTIONAL LAW.

1. Betterment act.] An act providing that the occupant of land, who holds under color of title, and in good faith, believing himself to be the owner, makes improvements and pays taxes thereon either before or since the passage of the act, cannot be dispossessed without compensation for the improvements and taxes, is constitutional; and this though he owned the life estate at the time of the improvements, if he held under a deed for the fee and supposed he owned the fee. *Poe v. Goodry* (45 Ark. 410), 560.

2. Estrays.] A city ordinance, enacted under the authority of a statute, authorizing the impounding of hogs found running at large in the city,

CONSTITUTIONAL LAW — *Continued.*

and their sale for costs and expenses, after public notice of sale, without farther notice to the owner, is valid. *Rest Smith v. Dedson* (46 Ark. 296), 589.

3. Holding State and Federal offices.] Under the constitutional inhibition of holding more than one lucrative office at the same time, a person may not hold the salaried office of township trustee and postmaster at the same time. *Polis v. Kerlin* (105 Ind. 221), 197.
4. Lent municipal bonds.] A large part of the city of Charleston having been burned, the legislature authorized the city to issue and lend its bonds to citizens desiring to rebuild. The bonds were issued and lent accordingly. Held, that they were invalid. *Feldman v. City Council of Charleston* (23 S. C. 57), 6.
5. Oleomargarine — title of statute.] A statute, entitled "to prevent deception in the manufacture and sale of dairy products, and to preserve the public health," forbidding the manufacture and sale of any products in the semblance of butter, not made exclusively of milk or cream, and providing that the State shall purchase the machinery now used in such manufacture, and that the State auditors shall allow the sum judicially decreed to be paid therefor, is unconstitutional. *Northwestern Manuf. Co. v. Wayne Circuit Judge* (58 Mich. 381), 693.
6. Political opinions as conditions of holding office — delegating power of choosing — interfering with local government.] A statute providing for the appointment of election inspectors in Detroit by a board to be appointed by the mayor and council, and to consist of two persons from each of the two leading political parties, is unconstitutional. *Attorney General v. Board of Councilmen of Detroit* (58 Mich. 218), 675.
7. Regulation of telephone companies.] The State may limit the price which telephone companies may charge for their patented facilities. *Hackett v. State* (105 Ind. 250), 201.
8. Taxation for schools — equality.] A law declaring a tax on the polls and property of persons of one color for the exclusive education of children of that color is unconstitutional. *Puitt v. Commissioners of Gaston Co.* (94 N. C. 709), 638.

See PARENT AND CHILD, 453.

CONTRACT.

1. Consideration illegal in part.] Where the plaintiff had purchased in this State, a lot and the building thereon, and a large quantity of intoxicating liquors and the fixtures of a bar in the building, for a gross sum of \$4,000, and no separate price was fixed or agreed upon for the lot, or intoxicating liquors, or the fixtures, and the contract as to the liquors and fixtures was in contravention of the prohibitory liquor law, held, that it was wholly void, and could not be specifically enforced. *Gertack v. Skinner* (34 Kans. 85), 240.
2. Gambling — "options" — "winner."] Option dealings in grain, where no property passes or is expected by either party to pass, are void as gam-

CONTRACT—*Continued.*

lifting contracts, and money paid thereon may be recovered under the statute, from the broker of the party as the "winner". *Pearce v. Foot* (118 Ill. 228), 414.

3. *To make one an heir.*] An agreement by one to take, maintain and educate an orphan girl, eleven years old, and for her services until she becomes eighteen, to leave her at his death a "child's part of his estate," is invalid. *Wood v. Evans* (118 Ill. 186), 409.

4. *Two instruments—deed and lease—construction.*] The owner of a hotel deeded a strip of land in the rear of the hotel, for the erection of a saloon, and at the same time executed to the grantee an agreement for a lease of two rooms in the basement of the hotel for five years, to be used for billiard rooms in connection with the saloon. The deed granted the right to use the south wall of the hotel to join the roof of the building he might erect, and the privilege to cut a door through from such building into the basement of the hotel. *Held*, that the deed and the agreement for the lease should be construed together, and gave the grantee no right to maintain the door after the expiration of the lease, and that parol evidence to vary the written agreement was incompetent. *Gard v. Brown* (118 Ill. 475), 484.

See DURESS, 815; EXECUTORS AND ADMINISTRATORS, 628; RAILROADS, 719; SALE, 101.

CONTRIBUTION

See NEGOTIABLE INSTRUMENT, 727.

CONTRIBUTORY NEGLIGENCE

See NEGLIGENCE.

CONVERSION.

Property fraudulently obtained—innocent purchaser.] One falsely and fraudulently representing himself to be a member of a responsible firm of commission merchants obtained goods from the owner, giving a forged check of the firm in payment, he then shipped the goods to the firm, who in good faith sold them on his account to an innocent purchaser, who in turn sold them. *Held*, that the owner being innocent and not negligent was entitled to recover for their value from the last purchaser. *Alexander v. Swackhamer* (105 Ind. 81), 180.

COPYRIGHT.

In judicial opinions.] A State has copyright in the judicial opinions of its judges. *Gould v. Banks* (58 Conn. 415), 148.

CORPORATION.

1. *Prohibiting officer to borrow from—title to bonds pledged for loan.*] If an officer of a corporation, forbidden by statute to borrow money from it, so borrows and pledges as security the bonds of an innocent third person as his own, the corporation acquires title thereto, if it acted in good faith.

CORPORATION — *Continued.*

- although the loan was also in violation of a rule of the directors. *Bowditch v. New England Mutual Life Ins. Co.* (141 Mass. 292), 474.
2. Right to hold land.] Although a corporation is forbidden by its charter to hold real estate, yet a deed of land to it is valid until vacated by a direct proceeding by the State for that purpose. *Mallett v. Simpson* (94 N. C. 37), 594.

CRIMINAL LAW.

1. Act of one as act of all.] Three persons entered the premises of another with intent to steal, and being discovered by the owner, one of them struck him, and another shot at him with a pistol. *Held*, that all were guilty of assault with intent to murder. *Hamilton v. People* (118 Ill. 34), 396.
2. Affray — provoking an assault.] If one by public abusive language or offensive conduct intentionally induces another to strike him, he is guilty of an affray, although he does not return the blow. *State v. Fanning* (94 N. C. 940), 653.
3. Delivering intoxicating liquor to minor.] A statute forbidding the sale or delivery of intoxicating liquor to any minor does not apply to a minor sent by his father to buy liquor for him. *State v. McMahon* (53 Conn. 407), 140.
4. Dying declarations.] A person mortally wounded in an encounter stated that the defendant shot him. He had not been informed that his wound was mortal, but had said he should not live three days. He made no preparation for death, used profane language and spoke of resuming business and being married. *Held*, that his statement was not competent as a dying declaration. *Digby v. People* (118 Ill. 123), 402.
5. — opinion.] A dying declaration that the defendant had no reason, that the declarant knew of, for perpetrating the crime, is admissible. *Boyle v. State* (105 Ind. 469), 218.
6. Evidence — threats of third person.] On trial for assault with intent to murder, where the defense is that a third person was the assailant, evidence of that person's threats against the assailed person is inadmissible. *State v. Beaudet* (53 Conn. 536), 155.
7. Forgery — misspelled signature.] An indictment will lie for the forgery of an obligation for the payment of money although the signature is misspelled. *State v. Covington* (94 N. C. 913), 650.
8. — railroad pass — indictment.] A railroad pass may be the subject of forgery, but it is not sufficient simply to allege in the indictment the forgery of a railroad pass, setting it out. The extrinsic circumstances, showing the authority of the officer whose name is forged, and the obligation of the company to honor it, must be averred. *State v. Weaver* (84 N. C. 886), 647.
9. — charging date.] An indictment charging an offense "on the 16th day of August, 1889," is bad on motion to quash. *Murphy v. State* (107 Ind. 96), 722.

CRIMINAL LAW — *Continued.*

10. **Larceny — appropriation of proceeds of pledge.]** Where one intrusts personal property to another to procure a loan on it, and the latter procures the loan but appropriates the proceeds, this is not larceny of the property pledged. *People v. Oruger* (103 N. Y. 510), 830.
11. **Liability of officer for mistaken arrest.]** A police officer, acting in good faith and with reasonable cause, is not criminally liable for arresting without a warrant a sober man for being publicly intoxicated. *Commonwealth v. Cheney* (141 Mass. 102), 448.
12. **Separation of jury — waiver.]** Even in a capital case, if the court permits the jury to separate before submission, and the defendant does not object until after verdict, the objection is waived. *Henning v. State* (106 Ind. 836), 756.
13. **View of premises — prisoner's presence at.]** Where the court in a criminal case orders a view of premises by the jury at the prisoner's request, it is no error to allow them to go without the prisoner in absence of any request on his part to accompany them. *Shular v. State* (105 Ind. 289), 211.

DEED.

1. **Delivery — presumption from recording.]** Where a father voluntarily executes and records a deed to his minor son, this is a *prima facie* delivery and acceptance, although there is no manual delivery and he retains possession of the deed. *Tobin v. Bass* (85 Mo. 654), 892.
2. **Description — monument — "block."]** In an agreement for a deed of land describing it by numbers and dimensions, and concluding, "known as the Cook and Clover block," the latter words control. *Lyman v. Gedney* (114 Ill. 888), 871.
3. **Post-mortem trust — construction.]** An intestate executed a sealed instrument by which he declared that he left certain notes described therein to his son-in-law, C., in trust, to be equally divided between the intestate's three daughters described, after his death. The notes were delivered to C., and the instrument was recorded. *Held*, an irrevocable deed taking effect at once. *Egerton v. Carr* (94 N. C. 648), 680.

See RAILROAD, 279.

DEFINITIONS.

See WORDS.

DIVORCE.

See MARRIAGE, 491

DOWER.

See PARTNERSHIP, 743.

DURESS.

1. **procuring a contract to compound felony.]** One cannot maintain an action to recover money paid by him upon a note given wholly or partly to compound a felony, although it was procured from him by duress and undue influence. *Haynes v. Rudd* (103 N. Y. 872), 815.

INDEX.

EMINENT DOMAIN.

See RAILROADS, 242.

ESTOPPEL.

See FRAUDS, 597.

ESTRAYS.

See CONSTITUTIONAL LAW, 593.

EVIDENCE.

1. **Declarations—res gestæ.]** The declarations of an injured person, to a physician as to the cause and circumstances of the injury are not admissible if not made until he has been removed and the physician has been called. *Merkle v. Township of Bennington* (58 Mich. 156), 606.
2. **Expert opinions.]** Whether it is negligent not to put out a plank for passengers to embark on a steamboat, and to try to embark without a plank, are not subjects of expert opinion. *Clinton v. Root* (58 Mich. 183), 671.
3. **Memorandum—time-book.]** Plaintiff called as a witness W., the foreman who had general charge of the work, under whom were two gang foremen, each having charge of a separate gang of laborers. W. kept a time book in which was entered the name of each laborer. He visited the work twice a day, and while there he checked on the time-book the time of each laborer as reported to him by the gang foremen, who did not see the entries. He also marked the men's names as he saw them, and knew their faces. The gang foremen testified that they correctly reported to W. the names of the laborers, and if any did not work full time they reported that fact also. Upon this proof the time-book was admitted in evidence. *Held*, no error. A written memorandum of materials used was admitted in evidence. W., the foreman, testified that he made the entries from daily information given him by the gang foremen, and that he entered the amounts as reported. The gang foremen testified that they reported the amounts correctly; neither saw the entries made or had any present recollection of the specific quantities so reported. It was inferable from the testimony of one of them that when the reports were made he had personal knowledge of the facts reported. *Held* competent. *Mayor, etc., of New York v. Second Avenue R. Co.* (102 N. Y. 572), 839.
4. **Physical examination of party for personal injury.]** Where a plaintiff in an action for personal injuries alleges that they are permanent, the defendant is entitled as a matter of right, to have a surgical examination. But where the evidence of experts is already abundant, the court may refuse the examination, subject to review in case of abuse. *Sibley v. Smith* (46 Ark. 275), 584.
5. **Opinion of value.]** In an action against a carrier for the loss of a ring, the plaintiff, a woman, whose husband had given her the ring, and who did not know its cost or value, nor the value of pearls, was allowed to point out a pearl of corresponding size, color and general appearance, and an expert was then allowed to state the value of the pearl pointed out. *Held* competent. *Berney v. Dinamore* (141 Mass. 42), 443.

EVIDENCE — *Continued.*

6. **Personal examination of party**] In an action for personal injuries, the court at the trial may in its discretion refuse to compel the plaintiff to submit to a surgical examination *Shepard v. Missouri Pacific Railway Co.* (85 Mo. 629), 890.
7. **Privileged — physician.**] Under the statute, the testimony of an attending physician, if offered by the patient or his representative, is competent, but not otherwise *Groll v. Tower* (85 Mo. 249), 858.
8. **Expert evidence**] The opinion of a fire marshal as to the cause of a fire is inadmissible *Cook v. Johnson* (58 Mich. 437), 708.
- Dying declarations**] *See* CRIMINAL LAW, 218, 402.
- Opinions**] *See* NEGLIGENCE, 703.
- Presumptions**] *See* MARRIAGE, 883.
See CRIMINAL LAW, 155; WILL, 346, 423.

EXECUTION.

1. **Exemption — gift from husband to wife of exempt property.**] Where a husband, whose property is less in value than the amount exempted from execution, gives part to his wife, who invests it in real estate for herself, that real estate is not liable for the husband's debts. *Burdge v. Bolin* (106 Ind. 175), 724.
2. — **printing materials.**] A printing press and printing materials, used in printing and publishing a weekly newspaper, from which the owner derives his principal support, personally arranging the matter and forms therefor, and performing such other work as is usually performed by the foreman of a weekly newspaper, are exempt from execution although he is not a practical printer, and most of the work is done by employees, and he is a partner in two other kinds of business, and is also a justice of the peace. *Bliss v. Vedder* (34 Kans. 57), 287.

EXECUTORS AND ADMINISTRATORS.

- Contracts between.**] An agreement between executors that one alone shall manage the estate is void *Wilson v. Leneberger* (94 N. C. 641), 628.
- Property in dead body.**] *See* PROPERTY, 1.
See NEGLIGENCE, 292.

EXEMPTION.

See EXECUTION, 287, 724; PENSIONS, 827.

FERRY

- Right of public to pass up and down stream.**] An exclusive franchise to maintain a ferry across a river does not prevent the public from using the river as a highway between points above and below. *Broadnax v. Baker* (94 N. C. 675), 638.

FORGERY.

See CRIMINAL LAW, 647, 650.

FRAUD.

1. **Constructive — physician and patient.]** In an action by an administrator to recover money given by his intestate to the defendant, on the ground of undue influence, there was evidence that the donor was a woman eighty-four years of age, sick much of the time, weak in mind and memory, and broken down; that the gift was of a large portion of the donor's estate; that the defendant, not a relative, was her physician, and attended her frequently; that he had charge of all her affairs; and was her only adviser; that he was consulted by the donor as to employing or discharging servants or nurses, and as to her domestic affairs; that she dressed according to his advice; that she relied upon him for direction in all her affairs, that the gift was made to him without consultation with any one; that the fact of the gift having been made was kept secret by him until after her death; and that when the donor's relatives visited her, he kept away. *Held*, that the question of undue influence was properly submitted to the jury. *Woodbury v. Woodbury* (141 Mass. 329), 479.
2. **Estoppel of married woman by.]** A son and his mother, a married woman, entered into an agreement to defraud his creditors, in pursuance of which he conveyed his lands to her, and in her name and as her agent contracted to sell them to a *bona fide* purchaser. After a portion of the purchase-money had been paid, she attempted to repudiate the contract, and sued to recover the land. *Held* not maintainable. *Boyd v. Turpin* (94 N. C. 187), 597.
3. **Voluntary conveyance — re-conveyance.]** A feeble and penurious old man, whose wife had sued him for a divorce and was threatening a suit for alimony and had contracted debts in his name and without his knowledge, conveyed away all his property without consideration, but it did not appear that he intended to defraud his wife or creditors. *Held*, that he might recover the property again. *Nichols v. McCarthy* (58 Conn. 299), 105.

See CONVERSION, 180; MARRIAGE, 256.

GIFT.

- Causa mortis — bond and mortgage.]** Bonds and notes secured by mortgage are a proper subject of a gift *causa mortis*, without indorsement, and the mortgage will be carried with or without formal delivery. *Kiff v. Weaver* (94 N. C. 274), 601.

GUARANTY.

- Continuing — evidence.]** A bond was executed reciting that the principal "has arranged and is about to purchase on credit" certain goods, and conditioned to be void if he shall pay for all goods purchased or that he may hereafter purchase, "according to the terms of purchase," otherwise to remain "in full force and effect for the amount of his said indebtedness, not exceeding \$3,000." *Held*, (1) that parol evidence was competent to show the terms of the purchase and credit; and (2) that the guaranty was not continuing. *Columbus Sewer Pipe Co. v. Ganser* (58 Mich. 335), 697.

GUARDIAN AND WARD.

Acceptance by guardian of note to predecessor.] A guardian who accepts as part of his ward's estate a note payable to a preceding guardian individually, takes it at his own risk. *State v. Greensdale* (106 Ind. 364), 753.

HIGHWAY.

1. **By prescription.]** A town street may become a public highway by twenty years' public use, but such use must be adverse, as of right, and accompanied by some action of the public authorities. *Stewart v. Frink* (94 N. C. 437), 618.
2. **Obstruction — scales.]** The owner of a town lot may not maintain hay-scales in the street in front of his premises, when the fee of the streets is in the town. *Emerson v. Babcock* (66 Iowa, 257), 273.

INDICTMENT.

See CRIMINAL LAW, 732.

INFANCY.

Rescission of contract.] An infant farmer who has purchased a horse may rescind and recover the price paid. *House v. Alexander* (105 Ind. 109), 189.

See NEGLIGENCE, 500.

INJUNCTION.

To restrain suit in another State.] A court of equity may enjoin a party in its jurisdiction from prosecuting a suit in another State. *Pickett v. Ferguson* (45 Ark. 177), 545.

INNKEEPER.

Negligence — exposing guests to infection.] An innkeeper, knowing that there was small-pox in his inn, kept it open for business, and received the plaintiff as a guest. The plaintiff did not know that there was small-pox in the inn, but had heard rumors to that effect. The plaintiff contracted the disease while there. *Held*, that the defendant was liable. *Gilbert v. Hoffman* (66 Iowa, 205), 263.

INSANITY.

Avoiding conveyance.] Where land is conveyed by an insane person before an inquisition and finding of lunacy, for a fair and reasonable consideration, without knowledge of the insanity or an advantage taken by the purchaser, the conveyance cannot be avoided if the consideration has not been returned, and no offer has been made to return it. *Oribben v. Maxwell* (34 Kans. 8), 233.

INSURANCE.

1. **Condition against other "valid or not."]** Where an insurance policy is conditioned to be void in case of "any other insurance," without consent, "whether valid or not," another policy in and of itself invalid and void, so that it constitutes no contract of insurance, is not within the

INSURANCE — *Continued.*

- prohibition, but if to avoid it requires the production of extraneous facts, it is within the prohibition. *Phenix Ins. Co. v. Lamar* (106 Ind. 513), 764.
2. **Life — intemperance — forfeiture — cancellation.]** A specific and separate stipulation in a policy of life insurance, that if the assured shall become intemperate to a certain degree the company may cancel the policy, supercedes a general stipulation that such a degree of intemperance shall work an absolute forfeiture. *Northwestern Mut. Life Ins. Co. v. Haselett* (105 Ind. 212), 192.
 3. **Suicide — unintentional self-destruction.]** A provision in a policy of life insurance, that if the assured, whether sane or insane, shall die by his own hand, the policy shall be void, has no application to a case where death ensues from an overdraught of whisky taken without any intention of destroying his life, by one who had become physically and mentally weak by causes beyond his control. *Id.*
 4. **Life — diverting fund by will.]** One whose wife is insured for the benefit of another may not divert the fund by his will. *Wilmaser v. Continental Life Ins. Co.* (66 Iowa, 417), 277.
 5. **Husband for wife — rights in.]** A husband who has procured a policy of insurance on his life for the benefit of his wife and children may not surrender it, without their assent, while it is in force, but if it has become forfeited for non payment of premiums, he may thereafter surrender it. *Whitehead v. New York Life Ins. Co.* (102 N. Y. 143), 787.
 6. **—.]** The non-payment of premiums after surrender of a policy in force will not effect a forfeiture as against the beneficiaries who are ignorant of the surrender. *Id.*
 7. **On husband's life for wife — assignment by wife — forfeiture.]** Where a wife procures a policy of insurance on the life of her husband for her benefit, paying the premium out of her estate, and assigns it and afterward fails to pay premiums after notice to do so, and the assignee surrenders it to the company, *held*, that the policy is forfeited, but that she can recover from the assignee the amount paid him by the company on the surrender, less premiums paid by him. *Frank v. Mutual Life Ins. Co. of New York* (102 N. Y. 266), 807.

INTOXICATING LIQUORS.

See CRIMINAL LAW, 140.

JUDICIAL NOTICE.

See SUNDAY, 555.

JURISDICTION.

Defendant partner not served.] A decree of a court against three persons composing a partnership, doing business in the State of the former, rendered on personal service on two of the partners in that State, does not bind the third, who resided out of that State, did not appear and was not personally served. *Pickett v. Ferguson* (45 Ark. 177), 545.

See MARRIAGE, 484.

LANDLORD AND TENANT.

1. Lease from tenant for life — termination.] Where a tenant for life leases the estate for a term of years at a yearly rent, and dies before one of the rent days, the rent cannot be apportioned, and the tenant may quit free of rent from the last rent day; but if he remains, and the reversioner acquiesces, the latter may recover for his use and occupation from the lessor's death. *Hoagland v. Crum* (118 Ill. 365), 424.
2. Tenant purchasing landlord's title.] A tenant may terminate the lease by purchasing his landlord's title at a voluntary or forced sale. *Pickett v. Ferguson* (45 Ark. 177), 545.
3. Tenant sub-letting or assigning lease — liability of assignee to landlord.] Where a lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will, as to the landlord, amount to an assignment of the lease, and its character is not destroyed, by the reservation therein of a new rent to the assignor with a power of re-entering for non-payment, or by its assumption of the character of a sub-lease; and the assignee, so long as he continues to hold the estate, is liable directly to the landlord on all covenants in the original lease which run with the land, including the covenant to pay rent. *Stewart v. Long Island R. Co.* (102 N. Y. 601), 844.
4. —.] An estate to arise *in futuro* cannot be tacked on to the estate of a lessee who has assigned his whole term, so as to create a reversion in him and establish the relation of landlord and tenant between him and his assignee, so far as strictly reversionary rights are concerned, or prevent that relation from existing between the assignee and the original landlord. *Id.*

See NEGLIGENCE, 270.

LARCENY

See CRIMINAL LAW, 530.

LEASE.

See LANDLORD AND TENANT, 424.

LEGACY.

See WILL.

LUNATICS.

See INSANITY, 233.

MANDAMUS.

- To compel probate of will.]** Mandamus will not issue to a probate judge to compel him to admit to probate a will pending an appeal from his refusal to admit to probate another will of the same testator. *People v. Knickerbocker* (114 Ill. 539), 879.

See SCHOOLS, 540.

MARRIAGE.

1. **Ante-nuptial agreement — wife's ante-nuptial will.]** An ante-nuptial agreement by an intended husband, that the woman should hold her property separately and independently, and that the marriage should not revoke her will previously made, nor affect her right to change it subsequently, renders such will valid. *Osgood v. Bliss* (141 Mass. 474), 488.
 2. **Conflict of laws — jurisdiction.]** A man and a woman, residing in Massachusetts, were married there. Subsequently the husband left his wife, without cause, and went to another State, of which he became a citizen. The wife, continuing in Massachusetts, filed in the probate court a petition for separate maintenance, notice of which was served upon her husband in the State where he resided. No attachment of his property was made. *Held*, that the court had jurisdiction of the husband's property in Massachusetts, and of his person, if found therein. *Blackinton v. Blackinton* (141 Mass. 482), 484.
 3. **Divorce — cruelty — masturbation.]** The practice of masturbation by a husband in the presence of his wife, but without compelling her to remain present, which injures her health by its effect upon her feelings, is not "cruel and abusive treatment," warranting a divorce. *W— v. W—* (141 Mass. 495), 491.
 4. **Oral settlement by wife — fraud.]** A widow owning one hundred and sixty acres of land in this State, which was all of her property and her sole means of support, induced G., a cripple, possessed of only a few hundred dollars to marry her, on her oral promise that the proceeds of the land should go to their support after they were married so long as they lived. G. married her reluctantly, and in reliance upon that promise. After the marriage he furnished rooms, food and clothing for the family, and also for the children of his wife by her former marriage, and permitted her to use \$100 of his money to pay a mortgage upon the land. The wife, about eighteen months after the marriage, delivered to her daughters by her former marriage deeds of the land, for the consideration of love and affection only, which she had executed without the knowledge or consent of G., just on the eve of her marriage. *Held*, that G. might maintain an action during the life of his wife to set the deeds aside. *Green v. Green* (34 Kans. 740), 256.
 5. **Presumption of validity — presumption of continuance of life.]** Where a woman, deserted by her husband, married another, more than six but less than seven years after the first had been last heard from, the presumption in favor of the validity of the second marriage outweighs the presumption of the continuance of the first husband's life. *Johnson v. Johnson* (114 Ill. 611), 883.
 6. **Tenancy by entireties.]** Land conveyed to husband and wife is held in tenancy by entireties, unaffected by the statute enabling married women to take and hold property to their sole and separate use. *Pray v. Stobbins* (141 Mass. 219), 463.
- Dower.]** *See* PARTNERSHIP, 742.
Suit by husband for death of wife.] *See* NEGLIGENCE, 292.
See FRAUD, 597.

MASTER AND SERVANT.

1. **Discharge for disobedience.]** An employer may not discharge an employee from his factory for a single act of disobedience, in absenting himself for a day, not involving any serious consequences and not unreasonable in itself. *Shawer v. Ingham* (58 Mich. 649), 712.
2. **Duty to young female servant.]** Where an inexperienced girl of tender years was employed by the defendant as a house servant, and during her employment her menses began, the defendant advised her that menstruation was a dangerous disease, likely to cause insanity and death, and that the best and only known remedy was hard and unremitting labor; and by reason of this advice she was induced to do work far beyond her strength, by reason of which she became sick and was permanently crippled and disabled. *Held*, that her father might recover damages. *Larson v. Berquist* (34 Kans. 334), 249.
3. **Fellow-servants — locomotive engineer and track-repairers.]** A railway locomotive engineer and a section-master of track-repairers are not fellow-servants within the rule as to master's liability for injury by one servant to another. *Calvo v. Charlotte, etc., R. Co.* (23 S. C. 526), 28.
4. **— railroad yard-master and car-repairer.]** A railroad yard-master and a car-repairer are fellow-servants. *Kirk v. Atlanta, etc., R. Co.* (94 N. C. 625), 621.
5. **Negligence — contributory.]** The plaintiff was employed by the defendant to haul goods to his factory, and unload them at a point to reach which it was necessary to drive under a rapidly-revolving shaft. Without his knowledge, the shaft had been broken and repaired with projecting bolts, since he drew his last previous load, and the wagon-way had been narrowed by the piling of staves, and had been raised so that he could no longer drive under the shaft while sitting on the load. The bolts were not visible when the shaft was in motion. By order of the defendant's foreman he attempted to drive under the revolving shaft to unload at the usual place, and in trying to step over the shaft was caught and injured. *Held*, that he was entitled to recover unless the jury should deem him guilty of contributory negligence. *Hawkins v. Johnson* (105 Ind. 89), 169.
6. **— mining — precautions against fire-damp — fellow-servant's negligence.]** The owner of a mine is not bound to employ the most expensive precautions against fire-damp, but only to use reasonable efforts for ventilation. If the owner of a mine has negligently allowed fire-damp to accumulate, and it is ignited by a servant who goes into it with a lighted lamp, instead of a safety-lamp, contrary to the owner's orders, and another servant is injured by an explosion, the latter has no remedy against the owner. *Berne v. Gaston Gas Coal Co.* (27 W. Va. 285), 304.
7. **— unequal buffers.]** It is negligent in a railway company to have cars in a construction train furnished with buffers of unequal heights. *Torrens v. Vicksburg, etc., R. Co.* (37 La. Ann. 630), 508.
8. **— unsafe railroad bridge.]** A railway company is liable for a personal injury to a locomotive engineer caused by an unsafe bridge,

MASTER AND SERVANT—*Continued.*

while the road was in course of construction and not open for trade or travel. *Van Amburg v. Vicksburg, etc., R. Co.* (87 La. Ann. 650), 517.

9. Ordinary risks of employment.] A fireman on a railway locomotive must take the risk of "bucking snow." *Bryant v. Burlington, etc., R. Co.* (86 Iowa, 305), 275.

MISTAKE.

See REFORMATION, 571; WILL, 346.

MORTGAGE.

See GIFT, 601.

MUNICIPAL CORPORATION.

- Appointment of officers by.] A city charter provided that the common council in joint convention should appoint a prosecuting attorney, but gave no direction as to the mode of appointment, and the convention had no power of removal. The convention met for the purpose of making the appointment, and voted "to proceed to ballot for a prosecuting attorney." A ballot was taken and the relator had a clear majority of all the votes cast and of the whole convention, and the result was announced by the presiding officer. A resolution declaring the relator elected was then proposed and lost. Two resolutions were then offered, one declaring the ballot taken void by reason of errors in it (which it was found did not exist), and the other declaring the defendant "elected and appointed prosecuting attorney;" both of which resolutions were passed. *Held*, that the relator was duly elected. *State v. Barbour* (53 Conn. 76), 65.
2. Defective sidewalk—*injury to child playing.*] There may be a recovery against a city for the death of a child caused by a defect in a sidewalk, although the child was rolling a hoop at the time. *City of Chicago v. Keefe* (114 Ill. 222), 860.
3. Defect in street—*loose stones.*] A horse while being driven on a city street was injured by stepping on one of several loose cobble-stones lying scattered on the surface of the street in sight of the driver. *Held*, by an equal division of the court, that an instruction to render a verdict for the defendant should not be disturbed. *McCool v. City of Grand Rapids* (58 Mich. 41), 655.
4. —*pile of lumber at side.*] A city street sixty-six feet wide was graded and kept in order for a space of thirty-one feet wide in the center. The sides had not been raised to that grade, and in one place a pile of lumber had been placed between the center part and the sidewalk. *Held*, that this did not constitute a violation of the statutory requirements to keep the streets "in good repair and in a condition reasonably safe and fit for travel." *McArthur v. City of Saginaw* (59 Mich. 357), 687.
5. Fire limits.] Under a power "to make regulations for guarding against damage by fire," a city may establish fire-limits and forbid the erection of wooden buildings within them. *City of Charleston v. Reed* (27 W. Va. 681), 336.

MUNICIPAL CORPORATION — *Continued.*

6. **Health officers employing nurses.]** A township board of health, authorized to guard against small-pox, may contract for nursing patients and destroying infected clothing. *Elliott v. Kalkaska Supervisors* (58 Mich. 452), 706.
7. **Negligence — stepping-stone on sidewalk.]** A stepping-stone in front of a public building just inside the curb of the sidewalk is not such an obstruction as will render a city liable for an injury sustained by a person falling over it, even though others had previously been injured by falling over it. *DuBois v. City of Kingston* (102 N. Y. 219), 804.
8. **License to street railway — obligation to repave street.]** Where a city grants to a street railway company the privilege of constructing and using a railway track in unpaved streets, on condition that it keep and maintain in good repair the space between the rails and for two feet on each side of the track, the city cannot compel the company to pave such space. *State v. Corrigan, etc., Railway Co.* (85 Mo. 268), 861.
9. **Right of mayor to vote — tie.]** Under a city charter giving the mayor the right to vote only in case of a tie, if four of the eight councilmen vote in the affirmative on the election of an officer, and the other four being present refuse to vote, the mayor may vote, and voting in the affirmative, the candidate will be elected. *Launts v. People* (118 Ill. 187), 405.
10. **Wharfage.]** A street in a city was laid out upon the bank of a navigable river, and paved and maintained at the expense of the city. Vessels were in the habit of landing at the street, and discharging their cargoes thereupon. *Held*, that the city was not entitled to charge as for wharfage facilities. *City of Shreveport v. Red River and Coast Line* (87 La. Ann. 563), 504.

Lost bonds.] See CONSTITUTIONAL LAW, 6.

See SUNDAY, 857.

NAMES.

See TRADE-MARK, 78.

NEGLIGENCE.

1. **Causing death of wife — suit by husband, administrator.]** Where a married woman is killed by negligence, her husband, as administrator, may maintain an action of damages therefor. *Dimmey v. Railroad Company* (27 W. Va. 83), 292.
2. **Contributory — killing person at railway and highway crossing — burden of proof.]** In an action against a railway for killing a person at a highway crossing, it must be affirmatively shown that the deceased was free from negligence. *Indiana, Bloomington and Western R Co. v. Greens* (106 Ind. 279), 736.
3. **— exposing inflammable material.]** The plaintiff carried on a varnish factory adjoining defendants' railway, and in the manufacture exposed benzine out of doors on his premises, which was ignited by sparks from defendants' engine, and caused the destruction of the factory.

NEGLIGENCE—Continued.

- Held**, that plaintiff was not negligent. *Kelly v. Living Island R. Co.* (103 N. Y. 530), 832.
4. —leaving moving street railway car.] It is not necessarily negligent to step off a street car in slow motion. *Conner v. Citizen Street Railway Company* (105 Ind. 62), 177.
5. Dangerous premises—trespasser.] A. owned a factory standing about ten feet back from the line of the street pavement, and extending along the street about eighty feet. The space between the street line and the building had been so paved that there was nothing to indicate where the street line ended, and in front of the building A. had erected a porch which came within six feet of the street line, and through which entrance to the building was effected. Alongside of the building and adjoining the porch was a deep and unfenced area. B., who was unacquainted with the surroundings, went to the factory after dark in search of her child, fell into the area and was injured. **Held**, that A. was liable. *Croogan v. Schiele* (53 Conn. 186), 88.
6. Dangerous sidewalk.] A lot owner in a city, constructing and maintaining a scuttle-hole in the sidewalk in front of his lot, and covering it so insecurely that a passer is injured, is liable to him therefor, whether the scuttle-hole was authorized by the city or not, and although the tenant had agreed to keep the scuttle closed. *Calder v. Smalley* (66 Iowa, 219), 270.
7. Violation of ordinance.] Keeping ashes in a wooden barrel, in violation of a municipal ordinance; is not negligent *per se*. *Id.*
8. Voluntary risks.] One voluntarily exposing himself to danger, in order to save his property from a fire caused by another's negligence, cannot recover therefor. *Id.*
9. Infants riding on street cars.] The driver of a feed car running on a street railway, allowed boys to ride free on the platform at his side. They becoming troublesome, he ordered them to get off, slackening the mule to a walk, but not touching or threatening them. Thereupon one pushed the other, a newsboy eleven years old, and he fell under the car and was killed. **Held**, that the company was not liable. *Lott v. New Orleans City, etc., R. Co.* (37 La. Ann. 337), 500.
10. Loss of clothes of tailor's customer while trying on.] The plaintiff went to the defendant's tailor shop to try on a suit of clothes which he had ordered, and was directed by a clerk to a closet in which to make the change. He came out from the closet to a mirror in an adjoining room, leaving his other clothes in the closet. While so absent his pocket-book, watch and some other articles were stolen from the clothes. No direct negligence on the part of the defendant was shown, but there was evidence of experienced tailors that it was customary to provide such dressing rooms for customers. **Held**, that defendant was not liable. *Rea v. Simmons* (141 Mass. 561), 492.
11. Of druggist—partners—contributory.] The plaintiff applied at the store of the defendants, apothecaries, for extract of dandelion. One of the defendants, by mistake, took down a jar of belladonna, which was

NEGLIGENCE—*Continued.*

correctly labelled, took the required quantity from it, and was wrapping it up, when the plaintiff put his knife into the jar, took out a small quantity on the point, and asked him if that was a proper dose, and he replied that it was. He thereupon swallowed it, and was poisoned and suffered injury. *Held*, that neither of the defendants was liable. *Gwynn v. Duffield* (66 Iowa, 708), 286.

12. Uninclosed pit — straying animal falling into it.] The defendant dug a pit under a cotton gin, near the highway, leaving it uninclosed, with corn and cotton seed scattered about it. The plaintiff's cow, turned out to commons remote from the gin, fell into it and was killed. *Held*, that defendant was liable. *Jones v. Nichols* (46 Ark. 207), 575.

Liability of partners.] *See* PARTNERSHIP, 15.

See CARRIER, 115, 514; INNKEEPER, 263; MASTER AND SERVANT, 28, 32, 304, 508, 517; MUNICIPAL CORPORATION, 655, 687, 804, 860; WHARF, 821.

NEGOTIABLE INSTRUMENT.

1. Check to false order—bona fide holder.] A., representing himself to be C. B., took stolen goods to the defendant, representing himself to be the owner, and ordering him to sell them for him. The defendant relying on those representations, sold the goods, and gave him in payment his check payable to the order of C. B. A. indorsed the check in blank by that name, and transferred it for value to the plaintiff. The defendant discovering the fraud stopped payment of the check. *Held*, that the plaintiff could recover the amount thereof. *Robertson v. Coleman* (141 Mass. 231), 471.
2. Maker paying forged note.] If one pays a forged note purporting to be made by him he cannot recover the amount. *Johnson v. Commercial Bank* (27 W. Va. 343), 815.
3. Not testamentary — consideration.] An old, infirm and diseased man, to pay a woman for boarding, nursing and caring for him, executed a written promise to pay her \$2,000, "one day after his death out of his estate." *Held*, (1) a promissory note; (2) that the value of the services was conclusively fixed. *Price v. Jones* (105 Ind. 543), 280.
4. Surety — contribution — evidence.] A surety who pays a note which he might have avoided because of an alteration by the addition of another maker without his consent, may compel contribution from co-sureties who signed it after such addition. In case of an irregular indorsement, parol evidence is competent as between the parties, to show that apparent indorsers were sureties. *Houck v. Graham* (106 Ind. 195), 727.

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OFFICE AND OFFICER.

- Deducting from salary for earnings while improperly removed.]** A city policeman, receiving an annual salary, was improperly removed and afterward restored. During his removal he earned money in other employments. *Held*, that this should not be deducted from his unpaid salary. *Pittsims v. City of Brooklyn* (102 N. Y. 536), 835.

See CONSTITUTIONAL LAW, 197; MUNICIPAL CORPORATIONS, 65.

OPINIONS.

- Judicial.]** *See* COPYRIGHT, 143.

See EVIDENCE, 445, 703.

PARENT AND CHILD.

- Statute awarding custody to overseers of poor — constitutionality — restoring custody.]** A statute authorizing courts and magistrates to award to the overseers of the poor the custody of children found to be neglected by their parents, and growing up without education or salutary control, and in circumstances exposing them to lead idle or dissolute lives, is constitutional, but such adjudication is not conclusive, and on *habeas corpus* the custody may be restored on showing the removal of the cause and the parents' competency and fitness. *Furnham v. Pierce* (141 Mass. 208), 452.

PARTNERSHIP.

- 1. Division of profits — real estate.]** Several parties hired a theater for a term of years and carried it on under an agreement to divide the profits in a specified proportion at the end of each year, reserving a certain proportion to meet contingent losses. One of the parties mortgaged his in-

PARTNERSHIP — *Continued.*

terest in the leasehold to secure his private debt. *Held*, that the arrangement was a partnership, and the mortgage was subordinate to the partnership debts, and that the mortgagee having notice of the equitable rights of the other parties, should not be protected as against their claims. *Priest v. Chouteau* (85 Mo. 396), 873.

2. **Liability for negligence — physicians.**] Where physicians are in partnership all are liable in damages for the professional negligence of one of the firm. *Hyne v. Erwin* (28 S. C. 226), 15.

3. **Non-trading—power to bind firm — burden of proof.**] One member of a partnership formed for conducting a theater has no implied power to bind his partner by a note in the firm name, in the absence of necessity, usage, or ratification; and the burden of proof is on the holder. *Pence v. Cole* (58 Conn. 58), 58.

4. **Real estate — dower.**] Where two agree to engage in the milling business as partners, the one to erect a building on a lot which he owns, and convey a half interest to the other, and the other to furnish the machinery, in all of which they are to be equal owners, and the former subsequently conveys an undivided half interest to a third, but dies without conveying to his partner as agreed, his widow has dower in the half of the lot not conveyed, but no interest in the building or other improvements, and the heirs take no interest in either of the lots or the improvements. *Grisson v. Moore* (106 Ind. 296), 742.

See NEGLIGENCE, 266.

PARTIES.

Physical examination.] *See EVIDENCE, 390, 584.*

PATENTS.

Jurisdiction of State court to prohibit use pending suit.] In a suit by the owner of a patent against a licensee for breach of contract to pay royalties, a State court may not restrain the defendant from the use of the patent during the suit. *Hat Sweat Manuf. Co. v. Reinisch* (102 N. Y. 167), 798.

PENSIONS.

Exemption.] Where a pensioner receives pension drafts from the government, and transfers them or their proceeds to another upon his agreement to convey land to the pensioner's wife, and the land is so conveyed, *held*, that it is not subject to the lien of judgments against the pensioner existing at the time the drafts were received by him. *Hissom v. Johnson* (27 W. Va. 644), 827.

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See EVIDENCE, 358; FRAUD, 473.

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PRINCIPAL AND AGENT.

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PRINCIPAL AND SURETY.

See SURETY.

PROPERTY.

1. In dead human body—in wearing apparel.] An administrator cannot maintain an action for the negligent or willful mutilation of the dead body of the intestate, but he may sue for injury to the wearing apparel. *Griffith v. Charlotte, etc., R. Co.* (23 S. C. 25), 1.
2. Shares of stock of cotton exchange.] Stock of the New Orleans Cotton Exchange is taxable as property. *Schreiber v. Board of Assessors* (37 La. Ann. 908), 528.

RAILROADS.

1. Condemnation—damages.] Where a railroad company has constructed and is operating its road through land of another, without having instituted condemnation proceedings or acquired title, the owner of the land may elect to sue for damages. Where a railroad grade has been constructed and abandoned, and another company takes possession and appropriates it, the owner of the land is entitled to recover the value of the land taken, as enhanced by such grade. Where a railroad company takes possession of land and constructs a track on it with the consent of the person in possession, under claim and color of title, and the paramount owner afterward sues for damages, the railroad company cannot be compelled to pay for improvements made by itself. *Cohen v. St. Louis, Fort Scott, etc., R. Co.* (34 Kans. 158), 243.
2. Contract to erect station—validity.] An action lies for a breach of a contract by a railroad company to establish and maintain a depot at a certain place. *Louisville, New Albany and Chicago R. Co. v. Sumner* (106 Ind. 55), 719.
3. Negligence—trespasser riding on pilot.] Where a trespasser rides on the pilot of the engine of a railroad construction train, in violation of the rules of the company but with the assent of the engineer, and is injured in consequence, the company is not liable. *Darwin v. Charlotte, etc., R. Co.* (23 S. C. 531), 82.
- 4 — contract—passenger.] By contract between the Missouri Pacific Railway Company and the defendant, the passenger trains of the latter were to be drawn over the road of the former between the town of Pacific, defendant's eastern terminus, and the city of St. Louis, the Missouri Pacific Company using its own locomotives and crews, and the defendant furnishing at its own expense all the train men, the manner of running the trains and the control of the train men being subject to the rules and regulations of the Missouri Pacific Company. *Held*, there could be no recovery against defendant for the death of a passenger caused by the failure of the train to stop long enough for him to alight at his destination between St. Louis and Pacific, the deceased having purchased his

RAILROADS—*Continued.*

ticket from the Missouri Pacific Company, for transportation from St. Louis to Webster where the accident occurred. *Smith v. St. Louis and San Francisco Railway Company* (85 Mo. 418), 380.

6. Right of way—right to take sand.] Under a deed to a railway company of a right of way "for all purposes connected with the construction, use and occupation of the railway," the company has no right to take sand from the land conveyed to build a round-house. *Vermilya v. Chicago, etc., R. Co.* (66 Iowa, 606), 279.

See CARRIER; MASTER AND SERVANT, 28, 169, 508, 517, 631; MUNICIPAL CORPORATIONS, 361; NEGLIGENCE, 177, 275, 380, 738.

REFORMATION.

- Of contract—mistake of law.] Where a promissory note was executed payable with interest at a conventional rate, in excess of the legal rate, and the parties intended it to bear the same interest after maturity, but supposed that the law implied it, *held*, that chancery would not reform the note by adding the words "until paid," but if the maker has paid that rate after maturity, he cannot recover back the excess. *Rector v. Collins* (46 Ark. 167), 571.

SALES.

1. Illegal—of property to be delivered in future.] A contract for the sale of property which the vendor does not possess, to be delivered in future, is not illegal unless both parties understood it to be a mere speculation in the future price, with no intention of delivering or accepting, and the burden of proof is on the party alleging the illegality. *Conner v. Robertson* (37 La. Ann. 814), 521.
2. Severable contract.] The defendant bought of the plaintiff hats, caps, collars and gloves, by an order classifying the goods according to kind, style and price per dozen. The parties understood that each article was to be itemized and carried out at one-twelfth of the price per dozen. In the printed heading of the bill rendered by the plaintiff was a statement that "all claims must be made in three days." Some of the articles did not conform to the order, but were not returned for a month. *Held*, (1) that the contract was apportionable, and the defendant could not be held for goods not conforming to the order; (2) that he was entitled to a reasonable time to return such goods; (3) that the question of reasonable time was for the jury. *Cohen v. Pemberton* (53 Conn. 221), 101.
3. To pretended agent—bona fide pledgee.] The plaintiff, refusing to sell to C., a broker, delivered goods to him on his representation that they were for an undisclosed principal in good credit, entering and billing them as a sale to C. It turning out that there was no such principal, *held*, that the plaintiff might maintain replevin for the goods from the defendant, C.'s bona fide pledgee. *Rodliff v. Dallinger* (141 Mass. 1), 439.
4. Warranty—patent defects.] It is no defense against a warranty of a kiln of brick, that the defect might have been discovered if the buyer had gone on top of the kiln. *Meckley v. Parsons* (66 Iowa, 63), 261.

SCHOOLS.

1. **For negroes — mandamus.]** District school directors are bound to furnish equal school facilities for blacks and whites, and where they have furnished three months' instruction for the whites, but none for the blacks, and show no intention to do so, and but a few days more than three months remain of the school year; and they have the funds to do it, they may be compelled by *mandamus* to do so, and may not proportion the school term according to the respective number of scholars in each class. *Maddox v. Neal* (45 Ark. 121), 540.
2. **Teacher's rules for conduct out of school.]** A public school teacher may make a rule forbidding scholars from quarrelling and using profane language on their way home, and punish them for disobedience of it. *Deekins v. Goss* (85 Mo. 485), 387.

See CONSTITUTIONAL LAW, 688.

SET-OFF.

Individual claim against trust claim.] Where a corporation put money in the hands of its general agent, as trustee, for safe-keeping and disbursement in the business, and afterward made a general assignment for creditors, *held*, that he could not offset a debt due him from the corporation. *First Nat. Bank of Detroit v. Barnum Wire, etc., Works* (58 Mich. 124), 660.

SHIP AND SHIPPING.

Master's liability for seaman's wages.] The master of a vessel is personally liable for the wages of a seaman earned while he is master, although the seaman was hired by a former master. *Smith v. Oakes* (141 Mass. 451), 487.

SLANDER.

Of business — prevention of publication of directory.] The plaintiff in his declaration alleged that he was and had been engaged for many years in compiling and publishing bi-annual county directories, at great labor and expense, and had acquired a large advertising patronage therefor, and a large list of subscribers; that he had prepared to and would have published the same in 1885, but that by reason of the false and fraudulent statement of the defendant that he had gone out of the business and disparaging his business, he had been prevented from doing so, and the defendant had published such a directory, to his injury; but he did not allege that he had been deprived of the benefit of any contract or property, or that the defendant published the directory as the plaintiffs', nor any infringement of copyright. *Held* no cause of action. *Dudley v. Briggs* (141 Mass. 582), 494.

STATUTE.

1. **"Conviction."] One is "convicted" who has pleaded guilty or been found guilty by a jury, although sentence has not been pronounced.** *Quintard v. Knoedler* (53 Conn. 485), 149.
2. **Stock-jobbing — corporate coupons payable in stock.]** A corporation issued notes with interest coupons, payable to bearer three years from date, and containing this provision: "The holder hereof may" on a day

STATUTE—*Continued.*

named, "or" on another day named, six months later, "and at no other time, exchange this note, coupons not due being attached, for the stock of the company at par, that is for one share." At a subsequent meeting of the corporation, before the first date named in the note, it was voted to increase the capital stock, and the stockholders were given the right to take shares at par therein, in the proportion of one new share to three old shares. At the time the notes were issued, there was in the hands of trustees a sufficient amount of full paid stock of the corporation, subject to its control and not otherwise appropriated, to enable it to perform its contract to deliver stock for the notes. *Held* that a bill in equity, filed on the day when the above-named meeting was held, by a holder of said notes, to enable him to share on equitable terms in the benefit of the issue of the additional shares, could not be maintained. *Pratt v. American Bell Telephone Co.* (141 Mass. 225), 465.

See CONSTITUTIONAL LAW, 693.

STATUTE OF FRAUDS.

1. *Agreement to accept draft for drawer's debt to another.*] An oral agreement to accept a draft for the drawer's debt to a third party is within the statute of frauds whenever the oral promise to pay such would be, but is valid when upon a new consideration between the promisor and creditor. *Chapline v. Atkinson* (45 Ark. 67), 581.
2. *Agreement to make child an heir.*] Where a husband and wife, in consideration that a young girl should live with them as their child until their death, and render such service as she was able, orally agreed to make her their heir, and at their death to will her their entire estate which consisted at the death of the survivor of real estate and also of personal property exceeding \$50 in value, *held*, that the agreement was within the statute of frauds, and performance on the part of the girl would not take it out of the statute. *Wallace v. Long* (105 Ind. 523), 222.
3. *Contract not to be performed in a year.*] An oral contract for services not to be completed in a year is void, although made subject to determination sooner on the happening of a certain event. *Meyer v. Roberts* (46 Ark. 80), 567.
4. *Mutuality.*] A contract of service for more than a year, signed only by the employer, is void for want of mutuality, and the other party cannot make it effective by written acceptance after the employer has refused to perform. *Wilkinson v. Heavenrich* (58 Mich. 574), 708.

STATUTE OF LIMITATIONS.

1. *Defendant in hiding but within jurisdiction.*] Defendant accepted a bill in Austria in May, 1873, due in three months. In July of that year he absconded and came to New York, where he has since lived under a fictitious name but not otherwise concealed. Plaintiff discovered him in April, 1882, and brought this action. *Held*, barred by the statute of limitations. *Engel v. Fischer* (102 N. Y. 400), 818.
2. *Payment by joint debtor.* Payment by one joint debtor cannot avoid the effect of the statute of limitations as to another. *Walters v. Kraft* (23 S. C. 578), 44.

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STOCK.

See PROPERTY, 523.

STOCK-JOBING.

See STATUTE, 465.

SUNDAY.

1. **Labor on — barber.]** The court will take judicial notice that carrying on the business of a barber on Sunday is not necessary. *State v. Frederick* (45 Ark. 847), 555.
2. **Municipal ordinance — general law.]** A village may ordain that places of business shall not be kept open on Sunday, although the general law only forbids such labor on Sunday as "disturbs the peace and good order of society." *McPherson v. Village of Chebanee* (114 Ill. 46), 857.

SURETY.

1. **Liability of estate.]** The estate of a deceased surety on a bond given by an insurance agent for faithful conduct and accounting, is liable for moneys coming into the agent's hands after the surety's death, but not for moneys coming to his hands on his retention in the agency after he had made default to the knowledge of the obligee. *Rapp v. Phenix Insurance Company* (118 Ill. 890), 427.
2. **Right to exact indemnity or further security from principal.]** One of several sureties of a trustee on his bond to secure the beneficiaries cannot maintain a bill to compel him to substitute solvent sureties for those who have become insolvent, or give counter security, on pain of removal. *Ridgeway v. Potter* (114 Ill. 457), 875.

See NEGOTIABLE INSTRUMENT, 722.

TAXATION.

1. **Of national banks.]** In the assessment of shares of national banks in a city, when the owner does not reside in the ward where the bank is located and has no real estate therein, the assessment may be made upon a special list, although the owner lives and is assessed for personal property in another ward. *Matter of Appl'n of McMahon v. Palmer* (102 N. Y. 176), 796.
2. **—.]** The mere fact that some corporations, or some personal property, are subject to a less rate of taxation than banks, will not vitiate the law imposing taxes upon bank shares, unless it clearly appears to be the legislative intent to effect discrimination against them. *Id.*
3. **—.]** The provisions of the act, authorizing proceedings to punish for misconduct in refusing or neglecting to pay a tax upon personal property, are not unconstitutional. *Id.*

See CONSTITUTIONAL LAW, 639.

TELEGRAPH.

Regulation of charges by State.] *See* CONSTITUTIONAL LAW, 201.

TENANCY.

By entireties.] *See* MARRIAGE, 463.

TENANTS IN COMMON.

Allowance for repairs and improvements by one.] On partition of land held in common, one tenant may be reimbursed for necessary repairs and improvements made at his expense. *Ford v. Knapp* (103 N. Y. 185), 782.

TRADE-MARK.

Family name.] A manufacturer has the right in good faith to use his own name as a trade-mark upon his goods, although it is the same as that of another manufacturer of like goods who uses the same as a trade-mark. *Rogers v. Rogers* (53 Conn. 121), 78.

TRUST.

Rescission.] A wife, for the purpose of evading her husband's importunities to dispose of her lands, and for a loan from a trustee, conveyed them in trust to pay her the income for her life, and on her death for her children with power to sell and to convey in certain contingencies, and reserving no power of revocation. The contingency of her surviving her husband was not provided for. The trustee sold and invested the proceeds. *Held*, that on the husband's death the widow was not entitled to rescind the trust. *Keyes v. Carleton* (141 Mass. 45), 446.

Post-mortem.] *See* DEED, 630.

See WILL, 153.

USURY.

See CONFLICT OF LAWS, 607.

VOLUNTARY CONVEYANCE.

See FRAUD, 105.

WAREHOUSEMAN.

Liability for false representation of safety of building.] The defendant, proprietor of a warehouse for storage, represented it in circulars to be fire-proof on the exterior. A statute required such buildings to have fire-proof metal window shutters. There were no shutters, and the window frames were of wood. By that representation the plaintiff was induced to store goods in the warehouse. The warehouse caught fire from another building on the window frames, and with its contents was consumed. *Held*, that a nonsuit on the ground that the representation was a mere opinion was error. *Hickey v. Morrell* (103 N. Y. 454), 824.

WARRANTY.

See SALE, 261.

WATER AND WATER-COURSES.

1. Grant of mill site — right to maintain dam.] Where the owner of an estate conveys a part, upon which is a mill, with a dam, "and all the water

WATER AND WATER-COURSES — *Continued.*

rights and privileges thereunto belonging and appertaining." subsequent purchasers of the servient estate take it subject to the right of the holders of the mill property to maintain such a dam as will raise the water to the ordinary height before the grant, and where that height was obtained by the use of flash-boards they may maintain a permanent dam of the same height. *Lammott v. Moore* (106 Ind. 240), 748.

2. **Accretion — rule for apportionment.**] The proper mode of apportioning accretions among riparian owners is the following: Measure the entire river front as it was when the lots were laid out, and note the aggregate number of feet frontage, as well as that of each lot; then measure a line drawn as nearly as may be with the middle thread of the stream opposite the shore line so measured; then divide the thread line into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measures in feet on the shore line; and then complete the division by drawing lines between the points, designating the lot or parcel belonging to each proprietor both upon the shore and river lines. *Kehr v. Snyder* (114 Ill. 313), 356.

See ACCRETION, 866.

WHARF.

Liability of owner for injury to vessel by obstruction.] The owner of a wharf is liable for an injury to a vessel lawfully using it, by an obstruction in the river bottom adjoining it, known to him but not to the master of the vessel. *Barber v. Abendroth* (102 N. Y. 406), 831.

WHARVES.

See MUNICIPAL CORPORATION, 894.

WILL.

1. **Ambiguity — evidence.**] A testator devised land to "the four boys." *Held*, that parol evidence that he had seven sons, three of whom were adults living in their own homes, and the other four were minors living with him, and his declarations before, at and after the execution of the will, were competent to show that the devise was intended for the minors. *Bradley v. Rees* (118 Ill. 327), 432.
2. **Attestation — witnesses not in presence of each other.**] Witnesses to a will need not attest it in the presence of each other. *Johnson v. Johnson* (106 Ind. 475), 762.
3. **Dying without issue.**] A will gave the residuum to the testator's son Daniel and his heirs, and in case the sons "should die without lawful issue," to the testator's other children. A codicil gave a specific bequest out of the residuum to the testator's son James. Daniel survived the testator. *Held*, that Daniel took an absolute estate. *Quackenbos v. Kingsland* (102 N. Y. 128), 771.
4. **Legacy — interest.**] A legacy of a fund in trust to pay the income to the testator's granddaughter, the trustee's daughter, or such portion as he might consider best, and payable within one year from the testator's death

WILL—*Continued.*

at the convenience of the executor, does not draw interest until a year from the testator's death. *Bartlett v. Slater* (58 Conn. 102), 78.

6. *Misdescription — application.*] A testator devised a "house and lot in Patoka, Illinois," describing it as "the north two-thirds part of lot No. 19 in block 10." At the time of executing the will she owned that part lot and lot 12 in the same block, but at the time of her death she owned only lot 12. In the absence of evidence that she owned a house on lot 19 at the time of the execution, *held*, that the description would not justify a recovery of lot 12. *Bowen v. Allen* (118 Ill. 53), 898.
6. *Suit to set aside for mistake — evidence — declarations of testator.*] In a suit to set aside a will because not expressing the testator's intentions, declarations of the testator before and after the execution are inadmissible. *Couch v. Eastham* (27 W. Va. 796), 346.
7. *Time within which it may be proved.*] In the absence of statutory regulation, a will may be admitted to probate at any time after the testator's death, but acts done and rights acquired under a previous grant of administration will be protected. *Robban v. Mueller* (114 Ill. 343), 869.
8. *Trust — charitable — certainty.*] A provision by will that the whole estate should "be used at discretion by the selectmen of B. for the special benefit of the worthy, deserving, poor, white, American, Protestant, democratic widows and orphans residing in B.," is valid. *Beardsley v. Selectmen of Bridgeport* (58 Conn. 489), 153.

Wife's ante-nuptial.] *See* MARRIAGE, 486.

See INSURANCE, 277, MANDAMUS, 376.

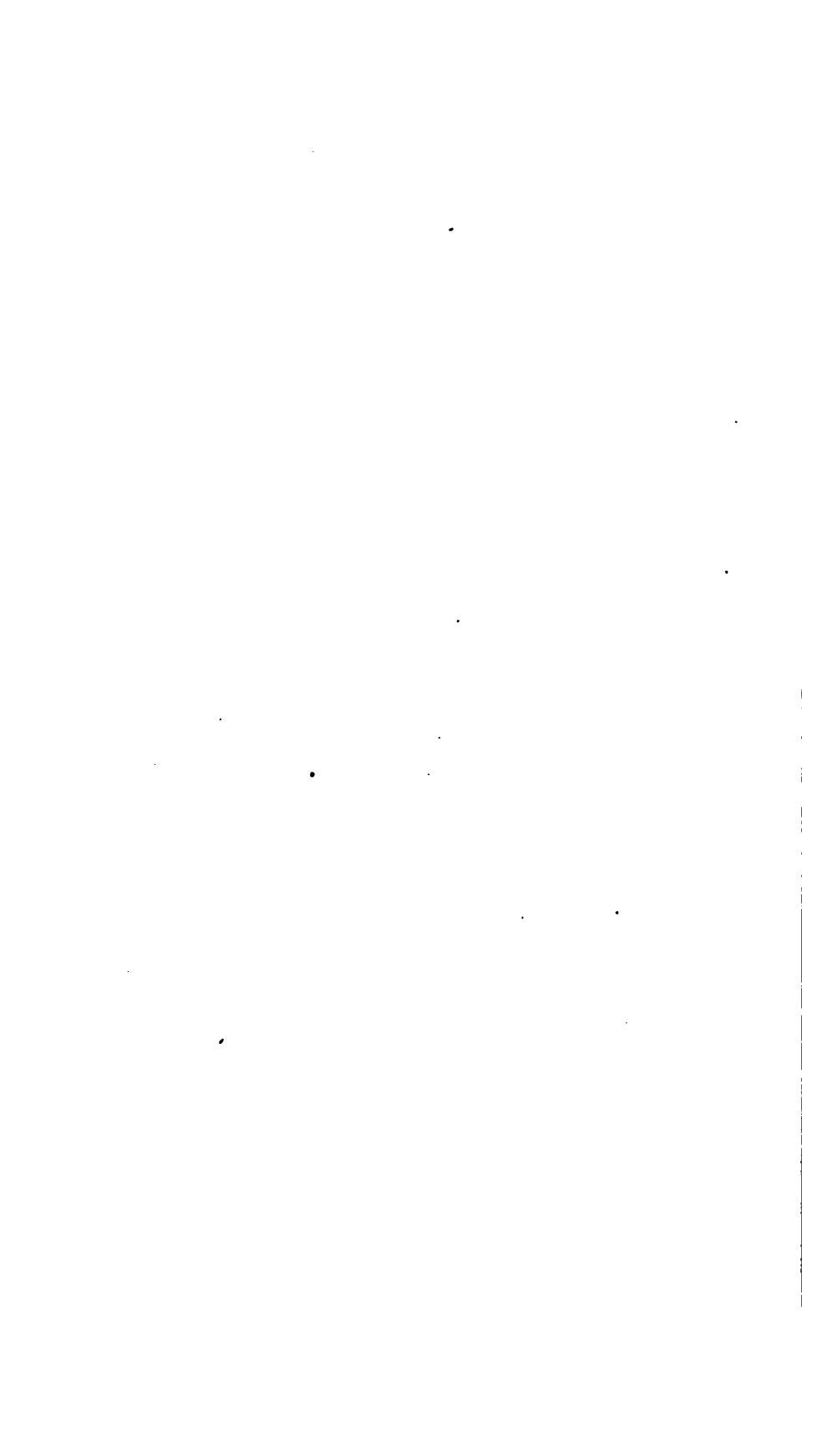
WORDS.

Conviction.] *See* STATUTE, 149.

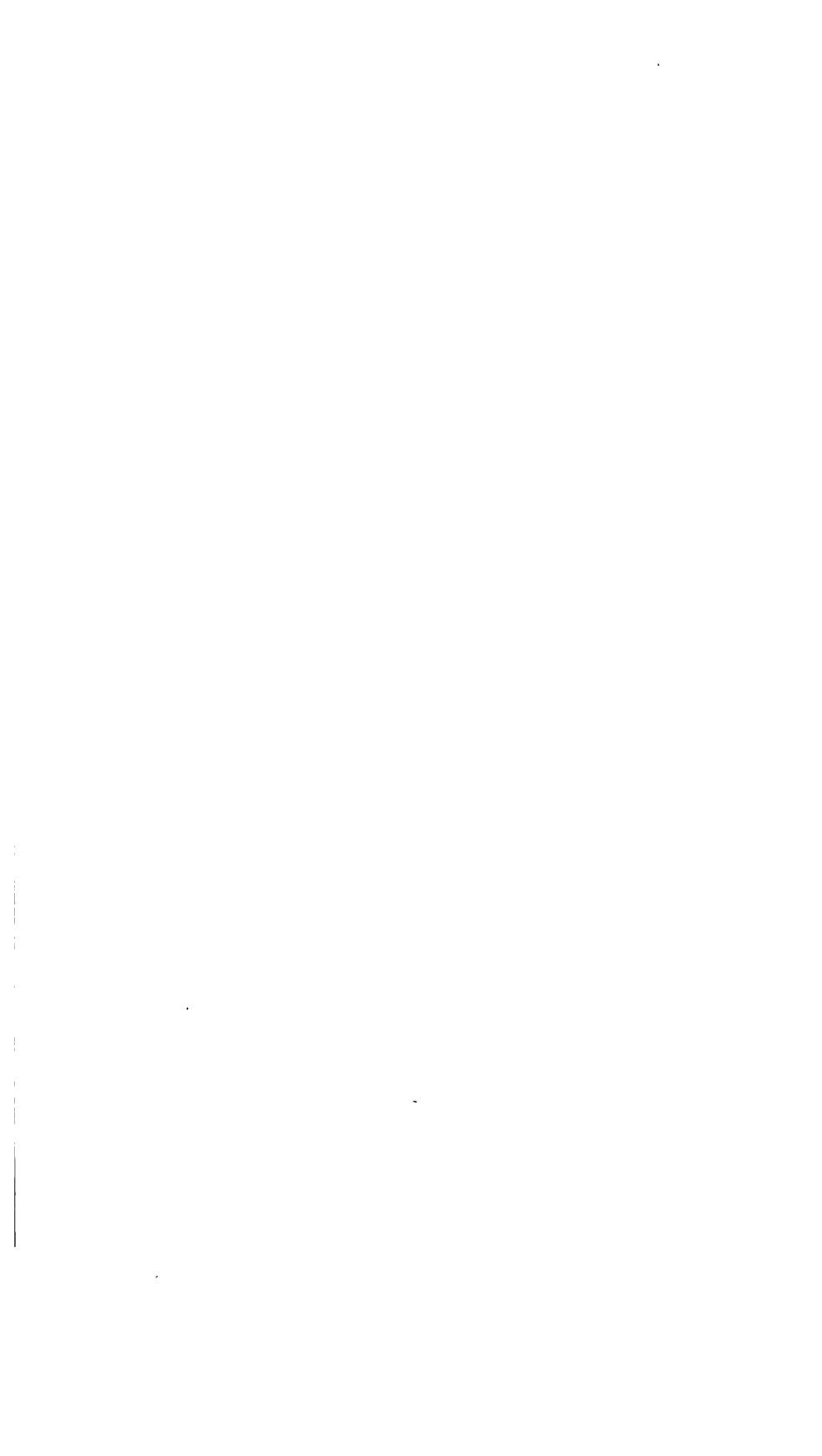
Dying without issue.] *See* WILL, 771.

Owner.] *See* AGISTER, 734.

Winner.] *See* CONTRACT, 414.









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